Supreme Court of the United States

OCTOBER TERM, 1969

No. 1250

ISIAH RELFORD,

Petitioner,

—v.—

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Docket Entries

(1) January 26, 1962—General Court Martial Order Number 17 entered approving findings of guilty and sentence and forwarding the record of trial for review by a board of Review.

(2) June 11, 1963—Decision of Board of Review, United States Army, approving the findings of guilty but modifying the sentence.

(3) August 12, 1963—Petition for grant of review filed in United States Court of Military Appeals.

(4) September 24, 1963—Order of United States Court of Military Appeals entered denying petition for review.

(5) October 11, 1963—General Court Martial Order Number 727 entered ordering execution of sentence.

(6) October 25, 1967—Petition for writ of habeas corpus with poverty affidavit lodged copy to U. S. Attorney.

October 30, 1967—Memorandum and order granting leave to proceed in forma pauperis, directing clerk to file petition, directing issuance of rule to show cause returnable in 20 days, 10 days to file traverse, filed and entered Stanley-CJ copy to petitioner copy to U. S. Attorney.

October 30, 1967—Petition filed pursuant to above order.

June 20, 1967—Memorandum and Order, finding 1. The general court-martial which tried and convicted the petitioner, was properly constituted, had jurisdiction over the person of the petitioner and the offenses of which he was convicted; 2. The sentence . . . was within legal limits and within the power of the court-martial to adjudge; 3. The petitioner's claim of ineffective assistance of counsel was raised and fully and fairly considered within the military courts system; 4. Petitioner was not denied effective assistance of counsel; 5. Petitioner is not

illegally detained by respondent, and is not entitled to his liberty; dismissing action, filed and entered Stanley-CJ Copies to petitioner, U. S. Attorney and JAGC officials of record.

June 20, 1967—Judgment on decision by the court filed Clerk cc to petitioner, U. S. Attorney and JAGC counsel of record JS 6 card made.

July 12, 1967—Notice of appeal filed copies to U. S. Attorney Benjamin E. Franklin; Lt. Col. Robinson and Capt. Locke copy to Clerk, U. S. Court of Appeals w/cert. copy of docket sheet.

(7) April 23, 1969—Opinion of United States Court of Appeals for the Tenth Circuit affirming judgment and order of the United States District Court for the District of Kansas.

(8) April 23, 1969—Judgment of United States Court of Appeals for the Tenth Circuit in accordance with its opinion filed.

(9) July 22, 1969—Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari filed.

(10) February 27, 1970—Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari granted.

[fol. 2]

TRANSCRIPT OF TRIAL—December 18 and 19, 1961

General Court-Martial

PRESIDENT: The court will come to order.

TRIAL COUNSEL: This court is convened by Court-Martial Appointing Order Number 23, Headquarters United States Army Training Center, Infantry, Fort Dix, New Jersey, dated 14 December 1961, as amended by Court-Martial Appointing Order Number 24, Headquarters United States Army Training Center, Infantry, Fort Dix, New Jersey, dated 18 December 1961, copies of which have been furnished to the law officer, each member of the court, counsel, the accused, and to the reporter for insertion at this point in the record.

* * * *

TRIAL COUNSEL: The prosecution is ready to proceed with the trial in the case of the United States against Isiah Relford, Corporal E-4, United States Army, Faculty Company, US Army Training Center, Infantry, Fort Dix, New Jersey, who is present in court.

* * * *

[fol. 32] TRIAL COUNSEL: I call as my next witness, Rosemary Futyma.

(Rosemary Futyma, a witness for the prosecution, was sworn and testified as follows:)

DIRECT EXAMINATION

Questions by Trial Counsel:

* * * *

[fol. 33] Q. Do you remember Labor Day of this year?
A. Yes, I do.
Q. Was it the 4th of September?
A. Yes.
Q. Where were you?
A. I was here in Fort Dix with my brother.
Q. What time did you get here?
A. A little after ten.

Q. Where had you come from?
A. Linden.
Q. Linden what?—New Jersey?
A. Yes.
Q. How far is that from here?
A. About sixty miles.
Q. Why did you come here?
A. My brother's wife had just had a baby and he came to see her.

* * * *

[fol. 34] Q. Why did you come here with your brother to see the baby?
A. Yes, he wanted to—
Q. To keep him company?
A. Yes, to keep him company.
Q. When you got to Fort Dix, where did you go?
A. I stayed in the car to listen to the radio.
Q. Where was the car parked?
A. In the hospital parking lot.
Q. Underneath a light or in the dark?
A. Yes, in the light.
Q. Were you by yourself?
A. Yes.
Q. Was the top down?
A. Yes.
Q. Rosemary, will you tell the court what happened that night?
A. I was sitting in the car listening to the radio and this man came up on the passenger side and he had a knife. He asked me if the keys were in the car and I said "No" and he said, I think he said, "They have to be because the radio is on." He told me to move over and start the car and drive him down the road. I told him I don't know how. He told me, "You better learn." I tried to start the car and I couldn't and he told me to get out of the car and walk down the road with him and he told me to keep quiet or I get the knife. I got out of the car. I was going to leave my pocketbook so my brother would know that something had happened, but the man told me to take it with me. I got out of the car and he put his left arm around my neck and we walked across the parking lot, the street behind the white cot-

[fol. 35] tages and into the field near the trees. He wasn't saying anything; we just kept walking. We got to this wooded section and he pushed me to the ground and told me to take my shorts off. I said no and he started choking me. He tried to find the zipper of my shorts and he couldn't. He told me to take them off. I got the shorts down to my hip and he took them the rest of the way off, and then he attacked me.

Q. Rosemary, would you complete your story. Did he take your shorts off?

A. Yes.

Q. Did he take your panties off?

A. Yes.

Q. And then what happened?

A. He attacked me.

Q. Did he penetrate you?

A. Yes.

Q. Forcibly?

A. Yes.

Q. Did he kiss you?

A. Yes.

Q. Did he put his tongue between your teeth?

A. Yes.

* * * *

[fol. 41] Q. In what state of dress was the accused at this time?

A. Black pants, dark shirt and what I thought to be a straw-colored hat.

* * * *

[fol. 59] The prosecution calls as its next witness, Mrs. Vivian Jackson.

(Mrs. Vivian Jackson, a witness for the prosecution, was sworn and testified as follows:)

DIRECT EXAMINATION

Questions by Trial Counsel:

Q. Mrs. Jackson, I would appreciate it if you speak loud enough for the members of the court furtherest from

you can hear. Would you state your full name, occupation and residence.

A. My name is Vivian Jackson and I live at—I will start all over again.

Q. Will you state your full name, occupation and residence.

A. My name is Vivian Jackson. I'm a housewife and a parttime waitress. I live at McGuire Air Force Base, Building 4043-F, Falcon Courts, and I'm from Georgia.

• • • •

[fol. 60] Q. Do you live at McGuire, you say?

A. Yes, sir.

Q. Is your husband a military man?

A. Yes, sir.

Q. In what branch?

A. The Air Force.

Q. Do you have any children?

A. I have five children, four boys and a girl.

Q. And you said you were a parttime waitress; is that correct?

A. Yes, sir.

Q. Will you tell the court where you do your part-time work?

A. At the Patio Drive-In at McGuire; it's run through the Exchange, McGuire Exchange.

Q. PX concessionaire?

A. Yes, sir.

• • • •

[fol. 61] Q. What time did you go to work that day?

A. Five o'clock.

Q. And your normal duty hours would have been up to what time?

A. To twelve or a few minutes after twelve, usually.

Q. Were you there throughout the entire seven hours?

A. No, sir, no, sir.

Q. Did you leave?

A. Yes, sir.

Q. At what time?

A. Well, it was approximately 9:05 or 9:10.

Q. Why did you leave, Mrs. Jackson?

A. I had taken my two oldest boys with me to work to go to the movie. The movie is right beside the Patio and I told my husband that I would be back and bring them home when I got my break—we usually get a break after the movie rush. So the children came out of the movie and came in and had dinner—not dinner, just a snack or something—and the movie rush was over about 9 o'clock, but I made some sandwiches to take home with me because I was going to eat too. So then the boss of that night, Danny Kopla, he just fills in more or less—I had asked him if I could take the children home and he said yes. He told me to be back in 20 minutes, and I kept standing there making up sandwiches, and he said, "Why don't you get going right now?" and I left through the back door with my children and took them home.

When I got home I got out of the car, went in the house and my husband was lying on the couch watching TV. I asked him if he wanted a sandwich. He said "Not now, maybe later." So I told him I have got to go back to work in a few minutes, I only have twenty minutes. He said, "All right, be sure to watch the clock," so I was fooling around with the children and he said, "Well, you [fol. 62] better go Vivian; it's about time for you to go back." It was approximately twenty or twenty-five after nine, around there, and I said, "O.K." I said I will have to hurry now because Danny would be expecting me right back.

Q. Danny was whom?

A. Danny Kopla, he was the manager that night. We have a regular manager but he has to have a night off, so Danny does it.

Q. I see.

A. So I went and got into the car and I still had my earrings and sweater—it was raining and I was in such a rush I didn't take time to put my sweater or anything on, just threw it over my shoulder and cranked the car up and backed out and pulled around to Andrews Lane and pulled out, and that way I turned to the left there and went down to West Castle Street and I turned left there and I started coming to the stop sign on South Bolling Boulevard that goes into McGuire.

Q. This is an intersection?
A. Yes, it is an intersection.
Q. Is that a full stop sign?
A. Yes, sir, there is a full stop sign there.
Q. This is the intersection of what?
A. Of West Castle and South Bolling Boulevard.

TRIAL COUNSEL: I would like the court to take judicial notice that there is such an intersection at McGuire Air Force Base. Any objection by the defense counsel to this judicial notice?

DEFENSE COUNSEL: The defense has no objection.

Q. Would you continue, please.

LAW OFFICER: Just a moment, please. There being no objection, the court will take judicial notice of that fact. Please proceed.

TRIAL COUNSEL: Thank you.

[fol. 63] Q. Mrs. Jackson, would you continue, please.

A. Even before I got to that sign I did see someone standing there. I didn't think anything about it. When you are driving along you see people standing along the road—the shuttle bus runs along there, although on Saturday they don't, but I never thought about it being Saturday. I was just determined to get back to work. When I got to the stop sign I didn't actually stop, I just hesitated and started to step down on the gas, and the next thing I knew there was someone trying to get in the door on my right, on the passenger side. So I was trying to open my door and I was screaming and over on the wrong side of the road, which would be the left, and I was going to run into the embankment, and I was screaming at him. I didn't know what in the world to do, I was so terrified that this man was trying to get in the car. So I was pretty sure the railroad tracks were near by, I'm pretty sure when the car was fully stopped I was at the railroad, right near it. He was coming across the seat and was holding me—I don't really know exactly—I was screaming at him and he put his arm, grabbed his arm around my neck and put the knife at my throat. He said, "Be quiet and I won't hurt you." I was just screaming everything at him. All of a sudden I said, "I will be quiet; I will be calm. What do you

want?" He said, "You just be quiet and I won't hurt you." I said, "Yes, sir," and so he told me, "I want you to just drive on down this road here." I said, "Yes, sir." And I said, "You must have a family here or something, why can't I just get out of the car, I will give you the car, I will just get out and go home. I have five little children at home." He said, "I thought you were supposed to be back at your job?" I had already told him I had to be at work some time there. He said, "I thought you were supposed to be back at work?" I said, "I am, but I will go home and take care of the children; my husband would be worried to death; he will have me reported missing; the Air Police will be looking for me [fol. 64] because I have to be back." He was quiet; I talked to him.

* * * *

[fol. 67] A. And then I pulled back out in the road and I backed up and I pulled up and I kept doing the wrong things. We finally got to where he wanted me to turn up—"There's where I want to go, straight up into this dirt road," and he says, "Slow down a little here." I was thinking all the time, "Oh, gee, what was he going to do? If I could just talk to him some more." He told me to turn to the right here and when we got to some telephone poles, I turned up into the right and he told me where to park and I parked.

Q. Did you go from the place he first jumped into the car to that place you just mentioned of your own consent?

A. No, sir.

Q. By force?

A. Yes, sir.

Q. Out of fear?

A. Yes, sir.

Q. Would you tell the court what happened at that point?

[fol. 68] A. Well, at this point I was told to stop and turn the lights off, which I did, and I started begging with him and telling him that he shouldn't do this and everything.

Q. Did you know what he was going to do?

A. Well, it was obvious that he was up to something —I don't—I was praying that I didn't really know because I had the idea—I was just praying that it was right the opposite, but he started fiddling around with his clothes and then he told me to take my pants off. I told him no, I couldn't, I was too nervous,—"Let me roll the window down and get some fresh air." I was afraid I would pass out. So he was unfastening his clothes. I wasn't looking at him because I thought if I don't look at him maybe he wouldn't kill me or something. And then he had gotten his clothes undone and everything, I presume—

Q. How far? Down to what extent?

A. I think that he had already gotten them down to his feet. I really wasn't looking but I saw something white—I figured it was his underwear—out of the corner of my eye. And he told me again to take my clothes off, my pants off—he didn't say "clothes". I told him that I couldn't, that I was too nervous and everything. So then he just kept—all this time he kept his hat and gloves on, never once took those things off, and so then he started getting real close to me and he was easing off my pants and getting me down to the seat and he had my head down back of where your—

Q. Arm rest?

A. —where you put your elbow on the thing, and my pants were laying on the floor. He had got, he was easing my dress up some way with his hand.

Q. Where was the knife?

A. Sir?

[fol. 69] Q. Where was the knife?

A. At my throat. So then he put his body against mine, he was down low on me, and he said, "Do what I have always been told redheads do," and I just lay there. I just turned my head away from him and just let him go ahead and do whatever he was doing. And after he finished the act, I tried to convince him that I would never turn him in. I told him I wouldn't turn him in because there would be so much publicity—I have five little children—and so he raised up and he was sitting up and he was getting his clothes on some way or

other, and I reached down and got my panties—I was trying to think of all kinds of evidence if I was found murdered—who wouldn't if you had a knife to your neck? So he says, "Well, you go ahead and start the car up." So I started the car up, I was sitting there and he said, "By the way, I don't know your tag number; what is your tag number?" I said "I don't know, you have to get out and see," and he said, "That is all right, I do know that you have five children and you work at the Patio. If you ever turn me in, I will find you, all of you." I said, "I won't turn you in, I won't turn you in." I was trying to convince him I wouldn't turn him in. I then started the car and he told me to turn around, just go around in that parking area there and I started driving out the same little road that I came up, and he told me to turn to the left. I turned to the left and I crossed the little bridge and there was a lot of lights on the hill there. I said, "Where am I; I'm lost?" and he said, "Oh, you're all right," like that, and then a little later I heard guns shooting or something and I said, "What's that?" He said, "That's some firing range," or something. So then we drove on a little bit more and I heard this whinning sound and I said, "What's that?" He says, "A plane probably," or something like that. So I started talking to him. I told him he shouldn't do things like [fol. 70] this to people; he shouldn't do anything like that—some woman might get a heart attack and wreck the car and kill him and everything else. He didn't say anything to that. So as we rode along, I started thinking of maybe now he is taking me somewhere else, maybe he didn't like where he was at. I started trying to cope with him some other way—maybe tell him a joke, something funny. I managed something about the people where I work. He laughed; it wasn't really that funny to me, but he laughed. By that time I saw the NCO Club.

Q. The NCO Club where?

A. On Fort Dix, here.

Q. Fort Dix?

A. Yes, sir. So I knew for sure where I was. I saw a sign up that said "Regiment" something, so I drove down this road and he told me that he wanted—as I

kept driving along I was talking to the man and as we come to a fence, he told me, "I want you to turn right here." So I pulled into it right there.

Q. Where was "there"? You pulled onto the grass?

A. No, sir, it was by a fence. There is a pavement there and there is a parking area.

Q. A parking lot?

A. Yes, sir. If you come down to the fence, you pull into a parking area. He told me to pull alongside this car, this green and white car—I don't know the make. And I saw the MPs over there about three or four cars down—there wasn't that many cars, but that's how many car lengths it would be—and all of a sudden he noticed them and he said, "Drive on across here." I said, "I can't drive across there now." He said, "You don't say anything, just drive on."

Q. Did the MP car follow you?

[fol. 71] A. I never did know. I never did know because the mirror was flipped backwards and I was only trying to think some way to get him caught. That was all that was going through my mind—if I could get out of the car and how was I going to get him caught. So I was driving along a road that had trees along it and it was, the road was real wet, and he said—I kept talking to him and talking to him—and he said, "Pull over, I want to show you how to get back to McGuire." So I pulled over there and there was a sign right up ahead of me "Yield the right of way," and it just so happened that I was in a no parking zone, which I had probably seen but really didn't dawn on me. So I pulled over there and he sit there a minute and started to open the door.

Q. You stopped or—

A. Yes, sir, I had stopped the car.

Q. Where was this place?

A. It was near the CID building. I could show you if I had to drive it; if I could drive it I could take you there; it's near here somewhere. * * *

* * * *

[fol. 79] EXAMINATION BY THE COURT

Questions by the President:

* * * *

[fol. 81] A. * * * I know he had his hat on.

Q. What kind of hat was it?

A. It was—you see them quite often now—just a—I forget the name of the thing, one of the modern type.

Q. Cap or fedora?

A. Not a hat you would pull down.

Q. Brimmed hat?

A. Yes, sir.

Q. Cloth? Made of cloth, do you know?

A. More like a felt or something; I don't know.

* * * *

[fol. 110] TRIAL COUNSEL: I call as my next witness, Mr. Maguire.

(Warrant Officer, William T. Maguire, a witness for the prosecution, was sworn and testified as follows:)

DIRECT EXAMINATION

Questions by Trial Counsel:

* * * *

[fol. 113] Q. Verbally, could you tell this court, Mr. Maguire, what he told you in regards to the offenses of which he was suspected?

A. When I questioned him, Relford told me on the night of 21 October at about nine o'clock at night he had been drinking in a bar in Wrightstown, New Jersey, sir. He was there drinking beer; he wasn't drunk but was feeling good—as he said "high". He stated that he felt he wanted to have intercourse with a woman. He told me that it wasn't especially particular to him whether it was a colored woman or a white woman. He said he felt that he wanted to have intercourse with a woman and didn't care whether he had to rape one to get it or not. Relford stated that he then drove his 1958 Oldsmobile down from Wrightstown to the housing area across the Cookstown Road from McGuire Air Force Base to

the Capehart area. He stated he drove the car half way through the housing area and parked the vehicle behind one of the blocks of dependent quarters where the officers and NCOs at McGuire Air Force Base are quartered. [fol. 114] After parking his automobile Relford stated that he walked back to an intersection. He said he didn't know the actual name of the streets, forming the intersection, but on one corner of the intersection there were some trees an a stop sign. He said there was no sidewalk on that corner but the stop sign came down almost to the curb. He stated he didn't think it was raining but it might have been drizzling. Relford said he stood at the stop sign there and waited. He said eventually there was a 1959 Chevrolet, along with a woman in it. Relford said this woman stopped for the stop sign, he walked over, opened the door on the passenger side of the front seat. Relford said he got into the vehicle, put his left arm around the back of the neck of the woman and then held a knife to her throat, the point of the knife at approximately her Adam's Apple. Relford said as he did this the woman attempted to open the door and attempted to get out of the vehicle on the driver's side. Relford said he reached over and closed the door and still held the knife at her throat. Relford said the knife he was holding at her throat was a hunting knife with a bone handle and he had gotten the knife when he was in jungle training school at Panama. Relford said after he got the door closed he held the knife at the woman's throat and told her to do as he told her and he wouldn't hurt her. He told her to drive down the road to the Cookstown Road. When she got to the intersection forming Cookstown Road, Relford said he told her to turn left on the road towards Cookstown. Relford said then, while driving down the Cookstown Road the woman told him that she had five children and begged him not to hurt her. Relford stated that he told the woman that if she did exactly as he said, he would not hurt her. Relford told me that the woman to whom he held the knife to her throat, was a redheaded white woman, was wearing a white dress, the type of dress that is worn by waitresses. When she got to Cookstown, according to

[fol. 115] Relford, he told the woman to turn right, which would take him on the Cookstown-Browns Mills Road. They went, according to Relford, down the Cookstown-Browns Mills Road until they got to a dirt road which led off to the left, the road, which, according to Relford, that goes back to Taylor Mountain. Relford then told her he had already missed the road in the dark and he told her to stop and back up, which she did, and then went into the dirt road. Relford said after going into the dirt road he instructed the woman to turn off to the right and park in one of the training areas. Relford said that he was holding the knife to the woman's throat at this time and when they got into the training area he told her to park and to do exactly as he told her and he wouldn't hurt her. Relford said then after they parked he started taking down his trousers and undershorts and he told the woman to take off her panties. Relford said that she did take off her panties unassisted and again Relford told the woman to do just as he said and he would not hurt her. Relford said after the woman took off her panties and he had his trousers and undershorts down around his knees, he forced the woman down on the front seat. Relford said that he then forced her legs around and got between her legs. He said that he then got between the woman's legs and inserted his penis in her vagina. * * *

* * * *

[fol. 118] Q. Mr. Maguire, will you tell us what conversation took place relative to this second part or second series of offenses?

A. Right, Sir. As I have stated, I used the words "Modus operandi" when I advised Corporal Relford of his rights. I told Corporal Relford "modus operandi" meant that the actual facts and circumstances, everything that had happened, was similar to the crime which had been committed on the 21st, and that I was going to question him on that kidnapping and rape. Corporal Relford admitted that he had committed that rape. Corporal Relford told me that at about 9:15 or 9:30, 2115 or 2130 hours on Labor Day, he had felt that he needed

a woman and he had been drinking. He subsequently went to Walson Army Hospital to find a woman. Corporal Relford stated that he had parked his car in the visitors parking lot at Walson Army Hospital and then walked over to the front of the hospital, which was the staff parking lot. He said that when he got to the front of the hospital in the parking lot there he saw a young girl that he thought to be about sixteen or seventeen years of age sitting in an automobile. Relford stated that he walked up to the passenger side of the front [fol. 119] seat, opened the door of the automobile and climbed into the front seat. Relford stated that he had put his left arm along the shoulders of the girl and around her neck and with the right hand put a skinning knife to her throat. Relford said it was not the same knife he used on the 21st of October, but a different knife that he had since lost and did not know where it was. Relford said while holding the knife to her throat, he told her to drive out of the parking lot and down the road. Relford said the girl told him she could not drive, did not know how to drive the automobile and could not drive. Relford said, still holding the knife to the girl's throat, he told her to get out of the vehicle and that he and the girl got out of the vehicle on the passenger side of the vehicle. Relford said he told the girl to do as he told her and he wouldn't hurt her. Relford then said he walked across the parking lot and across the street by a traffic light and walked behind the white buildings. Relford said while walking out of the parking lot and walking down the street, he had his left arm around the back of the neck of the young girl and held his head against hers to make it look like they were lovers out for a walk. As they walked across the parking lot he held the knife down by his right side trying to conceal it. Relford said he walked past these white buildings, across the field until they came to a wooded area. As he came to the wooded area he again put the knife to the girl's throat and instructed her to take off her shorts. Previous to this, he said the girl had been dressed in a blouse and shorts. He said he forced the girl down on the ground. Relford said as the girl and he were half

sitting, half lying on the ground, he removed the girl's shorts and panties. He said the girl begged him, was crying, begged him not to hurt her. Relford stated he [fol. 120] told her that if she did exactly as he said, he would not hurt her. Relford then said after he got the girl's panties and shorts off, he forced her legs apart and got between her legs. Relford said the girl was still crying and begged him not to hurt her. Corporal Relford said he told her again if she did exactly what he told her he would not hurt her. Relford then said he inserted his penis into the girl and stayed on her, having intercourse, for about four minutes. He said that, as he put it, * * *

* * * *

[fol. 150] VERDICT

PRESIDENT: Corporal Relford, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of all Specifications and Charges: GUILTY.

* * * *

[fol. 185] SENTENCE

PRESIDENT: Corporal Isiah Relford, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, all of the members present at the time the vote was taken concurring, sentences you: To be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death.

* * * *

EXHIBIT B

HEADQUARTERS
ARMY TRAINING CENTER, INFANTRY
Fort Dix, New Jersey

407213

GENERAL COURT-MARTIAL ORDER
NUMBER 17

26 January 1962

Before a general court-martial which convened at Fort Dix, New Jersey, pursuant to Court-Martial Appointing Order Number 23, Headquarters US Army Training Center, Infantry, Fort Dix, New Jersey, 14 December 1961, as amended by Court-Martial Appointing Order Number 24, same headquarters, 18 December 1961, was arraigned and tried:

Corporal (E-4) Isiah Relford, RA 14 479 005, US Army, Faculty Company, US Army Training Center, Infantry, Fort Dix, New Jersey.

Charge I: Violation of the Uniform Code of Military Justice, Article 120.

Specification 1: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, at Fort Dix, New Jersey, on or about 4 September 1961, rape, Rosemary R. Futyma.

Specification 2: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, at Fort Dix, New Jersey, on or about 21 October 1961, rape, Vivian G. Jackson.

Charge II: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, on or about 4 September 1961, at Fort Dix, New Jersey, in the Hospital Staff Parking Area, adjacent to

the Walson Army Hospital, kidnap and forcibly take away, Rosemary R. Futyma, a female child of about fourteen years of age and take her to a wooded area near the Grove Park Family Housing Area, a place on the Fort Dix Military Reservation and within the State of New Jersey.

Specification 2: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, on or about 21 October 1961, near the intersection of West Castle Street and South Bolling Boulevard, McGuire Air Force Base, New Jersey, kidnap and forcibly take away, Vivian G. Jackson, a female, and carry her by means of a motor vehicle, to an area near the intersection of the Cookstown-Browns Mills Road and Mount Road, a place on the Fort Dix Military Reservation, and within the State of New Jersey.

PLEAS

To all the Charges and *Specifications*: Not Guilty

FINDINGS

Of all *Specifications* and Charges: Guilty

SENTENCE

To be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death. (One previous conviction considered.)

The sentence was adjudged on 19 December 1961.

ACTION

HEADQUARTERS
US ARMY TRAINING CENTER, INFANTRY
Fort Dix, New Jersey

26 January 1962

In the foregoing case of Corporal (E-4) Isiah Relford, RA 14 479 005, US Army, Faculty Company, US Army

Training Center, Infantry, Fort Dix, New Jersey, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

/s/ R. H. TUCKER
/t/ R. H. TUCKER
Maj Gen, USA
Commanding

BY COMMAND OF MAJOR GENERAL TUCKER:

OFFICIAL:

R. L. KOLB
Colonel, General Staff
Act Chief of Staff

/s/ Carolyn M. Anthony
CAROLYN M. ANTHONY
Major, WAC
Act Asst AG

DISTRIBUTION: (DL 1-71)
13 (45)

OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE ARMY
TO THE ADJUTANT GENERAL

This order accurately rejects the results of trial and action of the convening authority in this case

FOR THE JUDGE ADVOCATE GENERAL

Copy sent
Correction Division, OPMG

EXHIBIT C

HEADQUARTERS
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

In the Board of Review, United States Army
Before BARON, ROBBLEE and BRACK, Members

CM 407213

UNITED STATES

v.

Corporal (E-4) ISIAH RELFORD, RA 14 479 005, US Army, Faculty Company, US Army Training Center, Infantry, Fort Dix, New Jersey

11 June 1963

HEADQUARTERS
U. S. ARMY TRAINING CENTER, INFANTRY

Sentence adjudged 19 December 1961
Approved sentence: Reduction to the lowest enlisted grade, total forfeitures and to be put to death.

Appellate Counsel for the Accused:

Captain GARY G. KELTNER, JAGC
Captain RICHARD A. BAENEN, JAGC
Captain DAVID M. GILL, JAGC
Lt. Col. RALPH HERROD, JAGC

Appellate Counsel for the United States:

Captain JOSEPH M. LIVERMORE, JAGC

DECISION

EDWIN W. BARON, Judge Advocate.

The accused was tried by general courts-martial for kidnapping and raping two females in violation of Arti-

cles 134 and 120, Uniform Code of Military Justice, respectively. He pleaded not guilty to all specifications and charges. The court returned findings of guilty and sentenced him to be reduced to the lowest enlisted grade, total forfeitures, and death. The convening authority approved the sentence.

The evidence surrounding these offenses are as follows:

On 4 September 1961 at about 2200 hours Miss F, 14 years of age, was sitting in her brother's automobile in the parking area adjacent to the Walson Army Hospital, Fort Dix, New Jersey. She had accompanied her brother who had gone into the hospital to visit his wife and newly born child. A negro man approached the passenger side of the car, wielded a knife and told Miss F. to move over and start the car. When she told him she didn't know how to drive he ordered her out of the car. He menaced Miss F. with the knife and led her across the parking lot into a field. There he had sexual intercourse with her by force and without her consent. He wore a hat and gloves during the entire incident. When he had accomplished his purpose he departed. Miss F. ran across the field to a lighted house where she complained that she had been raped. The occupant of the house testified that she was distraught and hysterical. Her clothes were disheveled and grass stained. The military police were called and they took her to the hospital.

On 21 October 1961, Mrs. J., married and the mother of 5 children, a part-time waitress at a drive-in at McGuire Air Force Base, left her employment shortly after 2100 hours during a 20-minute work break to take her two children home from the Post Theater. After delivering them she proceeded to return to work. Enroute, as she slowed down for a stop sign, the accused opened the car door and slid into the car on the passenger side. He placed a knife at her throat and directed her where to drive and park the car. Continuing to hold the knife at her throat, he had sexual intercourse with her. After the act was completed the accused again directed her to drive and then to stop. Military Police approached the car and asked to get out of the car, as she complied she told

the Military Police that the accused had raped her. The accused was immediately apprehended on the passenger side of the vehicle. She informed the Military Police that he had a knife which they found hidden under the front seat of the car. Her assailant wore a hat and gloves.

Relford was taken to the CID office where he was advised of his rights and informed that he was suspected of kidnapping and rape. He admitted consensual intercourse with Mrs. J. The next morning Relford was reinterrogated after again being advised of his rights. He orally confessed to raping and kidnapping both Miss F. and Mrs. J. A typed confession was then prepared and after again being advised of his rights he signed the written confession.

About 10 minutes later a line-up was conducted. A group of 6 other negroes of Relford's size and dressed in the same uniform were lined up. Miss F. and Mrs. J. were brought into the room and each member of the line-up read a prepared statement. After the last man had read the statement, each woman was escorted from the line-up and outside of the presence of each other independently identified the accused as her assailant.

The accused was examined by a psychiatrist who testified at the trial that Relford was sane.

Appellate defense counsel has filed a lengthy brief with this Board setting out 27 assignments of error, 20 of which are alleged to require a rehearing on the findings. The remainder of the assignments deal with sentence and post trial matters.

The only assignment that we consider requires consideration is that the accused "was deprived of his right to counsel possessing a requisite standard of skill" or as it is usually designated—inadequacy of counsel.

The Court of Military Appeals has had several occasions to set forth the standard required of defense counsel:

> "* * * [A]n accused, if he contends his rights have not been fully protected, must reasonably show that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty

> gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character. * * *". *United States* v. *Hunter*, 2 USCMA 37, 6 CMR 37.

Counsel for the accused states that trial defense counsel had inadequate experience. He had graduated from law school in May 1960 and from the Judge Advocate General's School in May 1961. He had no civilian trial experience. He had participated in only one other contested trial and had acted as military counsel where the defense was actively handled by a civilian lawyer.

Appellate defense counsel sets out 183 unrelated items setting forth acts and omissions of trial defense counsel which appellate defense counsel believes to be significant to a determination of the adequacy of the trial representation. It is unnecessary to set out in this opinion such suggestions of counsel. We only desire to point out that the fact that defense counsel did not pursue the tactics suggested by appellate defense counsel does not necessarily add up to an inadequate defense and, even if defense counsel had emulated appellate defense counsel's strategy of defense we have no reason to believe that would have made the defense adequate. It is a mistaken notion that the more objections, the more motions, the more cross-examination, the better the defense. It would be a sad day when defense counsel would have to resort to such tactics to protect themselves against a charge of inadequacy of representation.

A defense in a law suit, be it criminal or civil, is predicated upon the theory of defense. This is a definite and coordinated hypothesis that is based upon all the evidence and consistent with the applicable law on the subject and has a reasonable probability of success in convincing a jury that the accused is not guilty of the offense charged or creates in their mind a reasonable doubt of guilt. Appellate defense counsel's suggested tactics do not meet this standard.

In this case the defense counsel was called upon to defend an accused who was charged with raping and

kidnapping two females. The accused had been apprehended in the automobile of his victim immediately upon her complaint of rape to a military policeman. There could be no mistaken identity here. Mrs. J. was the mother of 5 children, she had left work during a work break to drive two of her children home from the post movie and shortly thereafter was raped at the point of a knife on her return to work. Any cross-examination impugning her morals or tending to infer a consensual date could not be expected to win any votes from a court.

Miss F. was fourteen years old. The evidence, amply corroborated, proved that prior to the rape she was a virgin. There was evidence of fresh complaint. She, distraught, disheveled, bleeding and bruised, rang the door bell of a stranger's house near the scene to seek aid. The assaulter in both rapes peculiarly wore a hat and gloves while attacking his victims which leads readily to the inference that both rapes were accomplished by the same individual. The accused, after being advised of his rights confessed to both rapes.

The line-up after the confession confirmed the accused's identity. Any question of accused's insanity had been resolved against him.

This is not a case where defense counsel was negligent or disloyal. He was aware of the strength of the government's case. Trial defense counsel's tactics were calculated and arrived at deliberately and with circumspection, as set forth in his affidavit filed with the record. The defense was a tacit admission that the women had been raped. Defense sought to build up as little "sales resistance" as possible, not to aggravate an already aggravated case with the hope that the court would not adjudge the death penalty. There is no showing that the accused requested counsel to take any of the actions suggested by appellate defense counsel or that he disapproved of the actions taken by trial defense counsel. We cannot say as a matter of fact or law that this was an inadequate defense. The fact that it failed before that particular court begs the question.

It is true that defense counsel was not an experienced counsel. It may also be true that he might have handled

the accused's defense in a far more aggresive manner but we are satisfied under all the circumstances we cannot say his theory was wrong or that the finding would have been different. Justice Minton's comment in *United States* v. *Morgan*, 346 US 516, 98 L. ed. 259, epitomizes the answer to the accused's charges when he said he did not know "how a lawyer might have helped him (the accused Morgan) unless he picked the lock on the jail house door".

Unfortunately for the accused there was little evidence available in extenuation and mitigation. No witnesses were called other than the assistant chief of the Mental Hygiene Consultation Service. In that the accused prior to his apprehension had been ordered to appear before a 208 Board convened to determine if he had such undesirable traits of character to warrant his elimination from the service, we can infer that had the defense placed the accused's character in issue there would have been substantial rebuttal testimony.

We have evaluated the accused and his offenses carefully and conclude that the death penalty is not appropriate in this case.

The accused's petition for a new trial heretofore filed has been considered and is hereby denied.

Therefore, the Board of Review finds the findings of guilty of all charges and specifications correct in law and fact. Reassessing the sentence, the Board of Review finds only so much of the sentence as provides for dishonorable discharge, total forfeitures, confinement at hard labor for thirty (30) years and reduction to the grade of E-1 should be approved. The findings of guilty and the sentence as modified are affirmed.

PAUL A. ROBBLEE, and JOSEPH L. BRACK, Judge Advocates, concur.

/s/ Edwin W. Baron
/s/ Paul A. Robblee
/s/ Joseph L. Brack

EXHIBIT G

UNITED STATES COURT OF MILITARY APPEALS

No. 17,072

UNITED STATES, APPELLEE

v.

Corporal ISIAH RELFORD (RA 14 479 005), APPELLANT

ORDER DENYING PETITION FOR REVIEW

On consideration of the Petition for Grant of Review of the decision of the Board of Review in case No. CM 407213 of the United States Army, it is, by the Court, this 24th day of September, 1963,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

cc: the Judge Advocate General
Col Joseph L. Chalk
Capt Ronald L. Gainer
Capt Gary G. Keltner
Appellate Defense Counsel
Lt Col Francis M. Cooper
Lt Col Bruce C. Babbitt
1st Lt Robert T. Webster
Capt Joel Robinson
Appellate Government Counsel

Copy sent to Research Branch Oct. 4, 1963

D34534

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. L-303

ISIAH RELFORD, PETITIONER

vs.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, LEAVENWORTH, KANSAS, RESPONDENT

MEMORANDUM AND ORDER

Petitioner, convicted by an Army general court-martial on two separate charges of kidnaping and rape, received a death sentence later reduced on review to thirty years imprisonment. The United States Court of Military Appeals affirmed. Petitioner is now serving his sentence in custody of respondent, and applies for a writ of habeas corpus and for leave to proceed in forma pauperis.

Petitioner alleges that he was not adequately represented by counsel. The right to assistance of counsel is a fundamental right essential to "military due process," paralleling the same right guaranteed by the Constitution to defendants in civilian courts. *United States* v. *Clay*, 1 U.S.C.M.A. 74. This court has jurisdiction to determine whether petitioner was denied this basic right although inquiry is limited to the question whether the military courts gave full and fair consideration to the constitutional question presented. *Kennedy* v. *Commandant*, 377 F.2d 339 (10th Cir. 1967).

In order that the court may be advised as to whether the question here presented has been fully and fairly considered by the military courts,

IT IS ORDERED that petitioner's motion for leave to proceed in forma pauperis be granted and that the application be filed by the clerk. And

IT IS FURTHER ORDERED that a rule to show cause issue, returnable within twenty days from this date; that within ten days after receipt by him of a copy of respondent's answer and return, petitioner file a traverse thereto, admitting or denying all factual allegations therein contained; and that the file then be returned to the undersigned judge of this court for such other and further proceedings as may be appropriate.

Dated at Kansas City, this 27th day of October, 1967.

/s/ Arthur J. Stanley, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. L-303

ISIAH RELFORD, PETITIONER

vs.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS, RESPONDENT

MEMORANDUM AND ORDER

Pursuant to the order entered October 30, 1967, a rule to show cause issued. Respondent has filed his answer and return, and petitioner his traverse thereto. The court, having examined the pleadings and exhibits and having read the entire record of trial, finds that no hearing is required to resolve issues of fact, and, from the uncontroverted allegations of the pleadings, makes the following

Findings of Fact:

1. Petitioner, while serving on active duty in the United States Army, was duly convicted on December 19, 1961 at Fort Dix, New Jersey by a general court-martial of the offenses of rape and kidnaping, and was sentenced to be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death.

2. During his court-martial, petitioner was represented by two qualified military lawyers, both members of the Judge Advocate General Corps, and both certified in accordance with Article 27(b), United States Code of Military Justice, 10 U.S.C.A. § 827(b).

3. Under the provisions of Article 61, U.C.M.J., 10 U.S.C.A. § 861, the convening authority referred the record of trial to his staff advocate for review. The staff judge advocate found the findings of guilty correct in law and fact, and recommended that the sentence as ad-

judged by the court-martial be approved. The convening authority approved the findings of guilty and the sentence, and forwarded the record of trial to the Judge Advocate of the Army for review by a Board of Review.

4. The Board of Review in the Office of the Judge Advocate General of the Army reviewed the record of trial as required by the provisions of Article 66, U.C.M.J., 10 U.S.C.A. § 866. The petitioner was represented in all proceedings before the Board of Review by a qualified military lawyer designated by the Judge Advocate General under the provisions of Article 70(a) and (c) and (c)(1), U.C.M.J., 10 U.S.C.A. § 870(a) and (c)(1). Petitioner's assigned military counsel appeared and argued the case before the Board of Review. On June 11, 1963, the Board of Review found the findings of guilty correct in law and fact, but further determined that only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for thirty years and reduction to the grade of E-1 should be approved. The board affirmed the findings and the sentence as so modified.

5. On August 12, 1963, petitioner filed a petition in the United States Court of Military Appeals for a grant of review pursuant to Article 67, U.C.M.J., 10 U.S.C.A. § 867, assigning as errors most of the matters considered by the Board of Review, including the allegation of ineffective assistance of counsel. On September 24, 1963, the Court of Military Appeals denied the petition for a grant of review. (14 U.S.C.M.A. 687).

6. The sentence, as modified and approved, was ordered into execution by General Court-Martial Order Number 727, Headquarters Fort Leavenworth, Kansas, dated October 11, 1963.

7. The trial tactics pursued by petitioner's counsel during the court-martial were justified by the nature of the offenses charged, the quality of the evidence against petitioner, and the possibility that the death sentence might be imposed. Counsel deliberately elected to pursue a course of conduct designed to avoid the extreme penalty despite overwhelming evidence of guilt.

The court makes the following

Conclusions of Law:

1. The general court-martial which tried and convicted the petitioner was properly constituted, had jurisdiction over the person of the petitioner, and the offenses of which he was convicted.

2. The sentence adjudged by the court-martial was within legal limits and within the power of the court-martial to adjudge.

3. The petitioner's claim of ineffective assistance of counsel was raised and fully and fairly considered within the military courts system.

4. Petitioner was not denied effective assistance of counsel.

5. Petitioner is not illegally detained by respondent, and is not entitled to his liberty.

IT IS, THEREFORE, ORDERED that the action be and it hereby is dismissed.

Dated at Kansas City, this 19th day of June, 1968.

/s/ Arthur J. Stanley, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action File No. L-303

ISIAH RELFORD, PETITIONER

vs.

COMMANDANT, U. S. DISCIPLINARY BARRACKS,
FT. LEAVENWORTH, KANSAS, RESPONDENT

JUDGMENT

This action came on before the Court, Honorable Arthur J. Stanley, Jr., Chief, United States District Judge, presiding, and a decision having been duly rendered,

It is Ordered and Adjudged that all relief be denied and the action be and it hereby is dismissed.

Dated at Topeka, Kansas, this 20th day of June, 1968.

CHARLES W. CAHILL
Clerk of Court

By /s/ Elizabeth C. Rion
Deputy

Entered in the docket 6-20-68

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. L-303

ISIAH RELFORD, PETITIONER

v.

COMMANDANT, U. S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS, RESPONDENT

NOTICE OF APPEAL

Notice is hereby given that Isiah Relford, the petitioner above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order dismissing the above entitled action entered on the 20th day of June, 1968 in above case.

/s/ Isiah Relford
Petitioner

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 40-68—March Term, 1969

ISIAH RELFORD, PETITIONER-APPELLANT

v.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS, RESPONDENT-APPELLEE

Appeal from the United States District Court for the District of Kansas

(District Court No. L-303)

JUDSON W. DETRICK for Appellant.

RICHARD F. LOCKE, Captain, JAGC, and KENNETH C. CROCKETT, Ass't U. S. Attorney, (BENJAMIN E. FRANKLIN, U. S. Attorney, and ARNOLD I. MELNICK, Lieutenant Colonel, JAGC, were with them on the brief) for Appellee.

Before BREITENSTEIN, SETH and HICKEY, Circuit Judges.

OPINION

BREITENSTEIN, Circuit Judge.

This is an appeal from the denial of a military prisoner's petition for habeas corpus.

Petitioner, while on active duty in the United States Army, was charged with the kidnapping and rape of a woman in September, 1961, and with similar offenses

against another woman in October, 1961. On December 21, 1961, a general court-martial found him guilty of all charges and sentenced him to death. The Board of Review upheld the findings of guilt and reduced the sentence to 30 years. That decision was affirmed by the United States Court of Military Appeals. In response to a show-cause order, the government filed in the district court the voluminous record made before the military tribunals. The district court reviewed that record, made appropriate findings, and denied the habeas petition without a hearing.

The first claim is that in the court-martial proceedings the petitioner did not have the effective assistance of competent counsel. This issue was fully presented to the Board of Review and the Court of Military Appeals and was carefully and fairly considered by those tribunals. They rejected the argument on the grounds that the objections went to trial tactics which must be considered in the light of the overwhelming evidence of guilt and counsel's desire to mitigate the penalty. Our review of the record convinces us that the court-martial was a disciplined contest and not a mockery or a spectacle. See United States v. Augenblick, 393 U.S. 348, 356, and Kienlen v. United States, 10 Cir., 379 F.2d 20, 24. We agree with the trial court that the military judicial system gave full and fair consideration to the constitutional question, and that its decision must stand. See Burns v. Wilson, 346 U.S. 137, 142, and Kennedy v. Commandant, United States Disciplinary Barracks, 10 Cir., 377 F.2d 339, 342.

The remaining points raised by resourceful appellate counsel were not presented to the district court and are not properly before us for review. Johnson v. Patterson, 10 Cir., 367 F.2d 268. In the circumstances of the case and to avoid a repetitive habeas application, we have given consideration to them.

About twelve hours after his arrest, the petitioner confessed to the military authorities. He had been repeatedly warned of his constitutional rights but the record does not show a waiver of counsel. The argument is that the extra-judicial confession was improperly received in evi-

dence in violation of the rules stated in Escobedo v. Illinois, 378 U.S. 478, and Miranda v. Arizona, 384 U.S. 436. In Johnson v. New Jersey, 384 U.S. 719, 734, the Supreme Court held that the Escobedo decision "is available only to persons whose trials began after June 22, 1964," and that the guidelines in Miranda are "available only to persons whose trials had not begun as of June 13, 1966." Here the entire military proceedings were completed before either the Escobedo or Miranda decisions.

The petitioner complains that he was subjected to a line-up at which he was identified by the victims of his crimes in violation of Gilbert v. California, 388 U.S. 263, and United States v. Wade, 388 U.S. 218. Stovall v. Denno, 388 U.S. 293, 300, says that these decisions operate prospectively. The line-up was fairly conducted and adequately protected the petitioner's due process rights.

The procedure followed for the admission and consideration of the confession is said to violate the rules laid down in Jackson v. Denno, 378 U.S. 368, 394. There the Supreme Court said that the voluntariness of a confession must be determined by a body other than the one trying the question of guilt or innocence. At the court-martial the law officer gave the defendant an opportunity, out of the hearing of the members of the board, to present evidence as to voluntariness. The defense put on no evidence and only pointed out the lapse of twelve hours from the arrest to the confession. The law officer then told the court-martial that his ruling was "final only on the question of admissibility" and "does not conclusively establish" voluntariness. This satisfied paragraph 140 of the Manual for Courts-Martial (1951) and the requirements of Jackson v. Denno if that decision is to be given retroactive effect. Heilman v. United States, 7 Cir., 406 F.2d 1011.

Finally, counsel for petitioner argues that the cumulative effect of all the claimed errors denied the petitioner a fair trial consonant with the requirements of due process. We are not persuaded. Consideration of the points one by one or in their totality, produces the same result. The petitioner had a fair trial.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

40-68

ISIAH RELFORD, PETITIONER-APPELLANT

vs.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS, RESPONDENT-APPELLEE

Appeal from the United States District Court for the District of Kansas

Before Honorable JEAN S. BREITENSTEIN, Honorable OLIVER SETH and Honorable JOHN J. HICKEY, Circuit Judges.

JUDGMENT—April 23rd, 1969

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court is affirmed.

WILLIAM L. WHITTAKER
Clerk

By /s/ Gladys E. Hobbs
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. 665 Misc., October Term, 1969

ISIAH RELFORD, PETITIONER

v.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to retroactivity and scope of O'Callahan v. Parker, 395 U.S. 258. The case is transferred to the appellate docket as No. 1250 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 27, 1970

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 388042 793

FILE COPY

FILED
JUL 27 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

TION NOT PRINTED
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No. 98

ISIAH RELFORD,

Petitioner,

v.

COMMANDANT, U.S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

JUDSON W. DETRICK
Suite 1010, 1700 Broadway
Denver, Colorado 80202
Attorney for Petitioner

Washington D.C. THIEL PRESS 202 393-0625

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 98

ISIAH RELFORD,

Petitioner,

v.

COMMANDANT, U.S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 35 through 37)[1] is reported at 409 F.2d 824. The Memorandum and Order of the United States District Court for the District of Kansas (R. 30 through 32) is unreported.

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[1] Reference is to the single Appendix filed in this Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 23, 1969 (R. 38). The petition for a writ of certiorari and motion for leave to proceed in forma pauperis were filed on July 22, 1969 and granted by Order of this Court dated February 27, 1970 (R. 39). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. I, Sec. 8, cl. 14:

> The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces;

United States Constitution, Art. III, Sec. 2:

> . . . The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

10 U.S.C. § 802(1) (Art. 2, Uniform Code of Military Justice):

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

10 U.S.C. § 920 (Art. 120, Uniform Code of Military Justice):

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

10 U.S.C. § 934 (Art. 134, Uniform Code of Military Justice):

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good

order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTIONS PRESENTED

This Court granted certiorari limited to questions of the scope and retroactivity of its decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969) (R. 39). Consequently, the questions presented are:

(1) Do the facts of this case fall within this Court's holding in *O'Callahan v. Parker, supra*, that a court-martial, held under the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, has no jurisdiction to try a member of the armed forces for the commission of a nonservice-connected crime?

(2) Should the rule of *O'Callahan v. Parker, supra*, be given full retroactive effect so as to apply to court-martial convictions that are final on the date of the *O'Callahan* decision?

STATEMENT OF THE CASE

Petitioner, while a corporal in the United States Army and stationed at Fort Dix, New Jersey, was arrested and charged by the Army with the kidnapping (10 U.S.C. § 934) and rape (10 U.S.C. § 920) of two different women on September 4, 1961 and October 21, 1961, respectively (R. 18 and 19). On December 18, 1961 petitioner was tried by general court-martial and on December 19, 1961 he was found guilty of all charges and sentenced to be reduced to the lowest enlisted grade, to forfeit all pay and allowances and to be put to death (R. 17 and 19).

The prosecution produced testimony that both rapes occurred in remote areas of Fort Dix (R. 5, 11, 15 and 16), that the September 4 kidnapping took place in the Walson Army Hospital parking lot (R. 4 and 16) and that the October 21 kidnapping took place at McGuire Air Force Base (R. 8 and 14). Other testimony established that at the time the alleged crimes were committed petitioner was on evening pass (R. 13) and dressed in civilian clothes (R. 5 and 13). The victim of the September 4 kidnap and rape was a civilian who lived some 60 miles from Fort Dix and happened to be visiting Walson Army Hospital with her brother (R. 3 and 4). The victim of the October 21 kidnap and rape was a civilian living at McGuire Air Force Base with her husband, a serviceman (R. 6).

The Army Board of Review found the findings of guilty correct on June 11, 1963, but further determined that only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for thirty years and reduction to the grade of E-1 should be approved (R. 21 through 26). On September 24, 1963 the United States Court of Military Appeals declined review (R. 27).[2]

On October 23, 1967, petitioner, *pro se,* filed a petition for writ of habeas corpus in the United States District Court for the District of Kansas. This petition is now before this Court. On June 19, 1968 the District Court denied the writ concluding *inter alia* that the general court-martial had jurisdiction over the person of the petitioner and the offenses of which he was convicted (R. 30 through 32). Petitioner appealed and the United States Court of Appeals for the Tenth Circuit affirmed on April 23, 1969 (R. 38).

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[2]Petitioner is currently on parole from his military sentence.

SUMMARY OF ARGUMENT

O'Callahan v. Parker, 395 U.S. 258 (1969), holds that military tribunals have no jurisdiction to try servicemen for the commission of peacetime crimes within the United States unless those crimes are "service-connected." Upon analysis of this Court's decision in *O'Callahan*, it is clear that the requirement of service-connection demands that the crime charged be military in nature before military jurisdiction can attach.

A "military" crime is one involving a level of conduct required only of servicemen and, because of the special needs of the military, demanding military disciplinary action. Petitioner's alleged crimes, as O'Callahan's, are not military in nature. They do not involve a level of conduct required only of servicemen. Furthermore, the military has no greater need to try petitioner's alleged crimes than it had to try O'Callahan's crimes. Within the context of the clear meaning of "service-connection," neither the fact that petitioner's alleged crimes took place on a military reservation nor the fact that one of the victims was a military dependent adds significant weight to an argument that the military has a special need in trying petitioner that it lacked in the *O'Callahan* case.

The purpose of the *O'Callahan* rule is to correct an abuse that affects the very integrity of the fact-finding process by which petitioner was convicted. The defect in petitioner's conviction goes to the very center of its legal justification, the power of the military court to act. In these circumstances, this Court has always held that decisions should be given retroactive effect. The fact that the authority of the military to try all crimes by servicemen had not been questioned before *O'Callahan* and that the consequent burden on the administration of justice may be substantial will not justify a prospective application of *O'Callahan*.

ARGUMENT

I. THE FACTS OF THIS CASE FALL WITHIN THE SCOPE OF THIS COURT'S HOLDING IN O'CALLAHAN v. PARKER.

A. Under O'Callahan v. Parker peacetime military jurisdiction over crimes committed within the United States is limited to those crimes involving a level of conduct required only of servicemen, violation of which creates an immediate need for military disciplinary action.

O'Callahan v. Parker, 395 U.S. 258 (1969), involved an inquiry into the extent of the power granted Congress by Article I, Section 8, clause 14 of the Constitution to vest courts-martial with jurisdiction over crimes committed by servicemen in peacetime within the United States. This specific inquiry had never before *O'Callahan* been presented to this Court, although the Court has often in analogous situations warned against extension of the very limited and extraordinary jurisdiction of military tribunals. See, *e.g.*, *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles*, 350 U.S. 11 (1955); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Enforcing a citizen of the United States' right to indictment by grand jury, guaranteed by the Fifth Amendment, and his right to trial by jury in a civilian court, guaranteed by Article III, Section 2 of the Constitution and the Sixth Amendment, this Court held that military tribunals have no jurisdiction over crimes committed by servicemen in peacetime within the United States unless those crimes are "service-connected." 395 U.S. at 272.

The phrase "service-connected" takes on explicit, identifiable meaning when viewed within the context of the factors considered by this Court in arriving at the conclusion that the crime must be so connected.

First, it was recognized that, "A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mech-

anism by which military discipline is preserved." 395 U.S. at 265."

See also *Reid v. Covert*, 354 U.S. 1 (1957). In short, military courts are of necessity not impartial weighers of justice, but must have as their primary consideration the enforcement of the unique discipline required of a fighting force.

Secondly, while it was recognized that a system of specialized military courts in which all the constitutional safeguards normally afforded citizens of the United States are not provided may be necessary to protect the effectiveness of our fighting forces, "the justification for such a system rests solely on the special needs of the military." 395 U.S. at 265. Consequently, this Court recognized that the jurisdiction of courts-martial must be limited to the "least possible power adequate to the end proposed." 395 U.S. at 165 (quoting from *Toth v. Quarles, supra*).

Finally, it is implicit in this Court's decision that all citizens, regardless of their military status, are entitled to the fundamental rights of indictment by grand jury and trial by jury in a civilian court guaranteed them by the Constitution unless they are in fact members of the armed forces *and* unless the crimes of which they are accused have an immediate adverse effect upon the ability of the military to perform its mission. Citizens of the United States do not automatically shed their citizenship upon entry into the armed forces. See *Burns v. Wilson*, 346 U.S. 137 (1953). In light of the essential nature of military courts, the limited nature of their jurisdiction and the continued citizenship of our servicemen, the phrase "service-connected" requires that the *nature* of the crime charged must involve a level of conduct required only of servicemen, violation of which creates an immediate need for military disciplinary action.

B. The crimes for which petitioner was convicted were not "service-connected" within the meaning of O'Callahan v. Parker.

O'Callahan, a sergeant in the Army, stationed in Hawaii, was charged with and convicted by a general court-martial of the crimes of attempted rape, assault with intent to commit rape and house-breaking with intent to commit rape. The crimes took place off-post, while O'Callahan was on evening pass and dressed in civilian clothes. The victim was a civilian having no connection to the military. The offenses charged were cognizable in the civilian courts and were committed in peacetime within the territorial limits of the United States while the civilian courts were open and functioning. Finding not the remotest connection between O'Callahan's crimes and the special needs of the military, this Court held that the crimes were not service-connected and that O'Callahan "could not be tried by court-martial but rather was entitled to trial by the civilian courts." *O'Callahan v. Parker, supra,* at 274.

The relevant factual differences between the instant case and *O'Callahan* are: (1) the crimes charged differ; (2) petitioner's crimes are alleged to have occurred on military reservations (R. 5, 11, 14, 15 and 16); and (3) one of the alleged victims was the wife of a serviceman (R. 6). These *apparent* distinctions evaporate when viewed within the context of the "service-connected" test provided by the *O'Callahan* decision.

The level of conduct petitioner is alleged to have violated by his alleged crimes (*i.e.*, sexual intercourse only with consent (see, 10 U.S.C. § 920)) is certainly a level of conduct required to the same degree in the civilian as the military community. The required level of conduct is neither altered by geographical considerations nor by the fortuity of military dependency. In short, the crimes of which petitioner was charged are no more "military crimes" than the crimes involved in *O'Callahan*.

Moreover, there is no greater or more immediate need for military disciplinary action in the instant case than there was in *O'Callahan*. The military dependence of one of petitioner's alleged victims does not present any immediate adverse impact upon the ability of the military to perform its mission not also presented by the facts of *O'Callahan*. The United States Court of Military Appeals has held that this status of the victim does not suffice under the service-connected test. *United States v. Henderson*, 18 U.S.C.M.A. ___, 40 C.M.R. ___ (1969). It is submitted that an analysis of that holding in the context of an inquiry as to the immediate impact upon the mission of the military compels adoption by this Court of the conclusion reached by the Court of Military Appeals.

In light of the foregoing, it appears certain that had petitioner's crimes occurred off-post, the military would have no jurisdiction under the *O'Callahan* rationale. Yet, the impact on the ability of the military to perform its mission remains the same whether the crimes of which petitioner was charged are committed on or off the military reservation. If the on-post locational factor in the instant case adds a military interest not present in *O'Callahan*, it is an interest in the maintenance of law and order on the military reservation. This interest is adequately served in the case of nonmilitary crimes by the apprehension of those who commit the crimes. Trial of and punishment for the commission of those crimes by courts-martial is an expansion of their jurisdiction beyond the "least possible power to the end proposed." The on-post/off-post distinction therefore has little meaning within the context of the *O'Callahan* decision.

To place conclusory importance on the on-post location of a crime rather than the nature of the crime presents logical incongruities. Will tax fraud, arguably cognizable under the "general article" of the Uniform Code of Military Justice (10 U.S.C. § 934) be held to be within the scope of military jurisdiction and is a citizen soldier to be deprived

of his fundamental constitutional rights simply because a serviceman executed his tax return in on-post housing rather than in the nearby community? In the instant case it seems anomalous to have petitioner's right to a jury trial for rape depend on where he directed his alleged victim to pull her car off the road.

Recent decisions of the United States Court of Military Appeals point out the arbitrary nature of jurisdiction based on an on-post/off-post dichotomy. In *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969), a civilian taxi driver was assaulted on-post, forced to drive off-post, and there robbed. Military jurisdiction was upheld as the assault was an element of the robbery. However, in *United States v. Riehle*, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969), an automobile was stolen off-post and driven on-post and no sufficient service connection was found. *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969), involved both on-post and off-post sodomy. While the former was found to be triable by court-martial, the latter was not. In *United States v. Williams*, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969), the accused had passed bad checks at an on-post post exchange and an off-post grocery store. All checks were written on an off-post bank. The court found service connection in only the checks passed on-post.

It is submitted that the two factual differences between the instant case and *O'Callahan* are not sufficient to give the crimes of rape and kidnapping an immediate adverse impact upon the ability of the military to perform its mission. Certainly the facts of this case fall without the ambit of the "least possible power adequate to the end proposed" concept of the *O'Callahan* decision. The constitutional rights of the citizen-soldier sought to be protected are too fundamental to allow the phrase "service-connected" to be broadly construed to support the extensive exercise of military jurisdiction. There must be some strong factor that makes the exercise of those rights totally incompatible with the operation of an effective military

organization. There can be no justification for granting wider military jurisdiction than is justifiably required by the special necessities of the military. See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (concurring opinion of Mr. Justice Murphy); *cf. United States v. Robel*, 389 U.S. 258 (1967); Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

It is implicit in *O'Callahan* that purely military crimes (*i.e.*, those offenses involving a level of conduct required only of servicemen having an immediate adverse impact on the ability of the military to perform its mission) should be subject to military jurisdiction, but military jurisdiction must also be limited to purely military offenses when crimes have been committed in time of peace and within the territorial limits of the United States. This interpretation is not without historical support (see Duke and Vogel, *supra;* Brief for Petitioner; *O'Callahan v. Parker, supra*) or decisional authority. See *Ex Parte Mason*, 105 U.S. 696 (1882). Congress itself implicitly recognized the distinction between military and nonmilitary offenses when it enacted the Punitive Articles of the Uniform Code of Military Justice. 10 U.S.C. § 877 *et seq.* While that statute defines crimes known to the common law as murder, manslaughter and rape (10 U.S.C. §§ 918, 919 and 920), it also defines such crimes as desertion, absence without leave and missing movement which are totally unknown to the common law or other criminal statutes. 10 U.S.C. §§ 885, 886 and 887. In addition, it defines crimes such as assaulting a superior commissioned officer and being drunk on duty, 10 U.S.C. §§ 890 and 912. While these crimes have elements similar to common law or statutory crimes, they have an additional element giving them peculiar military significance and are therefore separately defined. The last two categories of crimes are clearly military in nature and readily identifiable. It is submitted that they are the only crimes that by their nature have an immediate adverse impact upon the ability of the military to perform its mission. Only crimes of this

nature are proper subjects for the exercise of military jurisdiction.

In conclusion, the crimes of which petitioner was convicted do not involve a level of conduct required only of servicemen and have no greater impact on the ability of the military to perform its function than O'Callahan's crimes. Petitioner's alleged crimes were not "service-connected" within the meaning of *O'Callahan*. Consequently, the court-martial convened by Court-Martial Appointing Order Number 23, Headquarters United States Army Training Center, Infantry, Fort Dix, New Jersey, had no jurisdiction to try petitioner. It follows *a fortiori* that their findings were void and petitioner's conviction was a nullity.

II. O'CALLAHAN v. PARKER SHOULD BE GIVEN FULL RETROACTIVE EFFECT

Petitioner was tried and convicted by general court-martial on December 19, 1961 (R. 19). The United States Court of Military Appeals denied petitioner's petition for review on September 24, 1963 (R. 27). On the latter date petitioner's conviction was no longer subject to direct review. James O'Callahan was convicted by general court-martial in 1956 and that conviction became final on March 1, 1957. Brief for Petitioner at 6; *O'Callahan v. Parker*, 395 U.S. 258 (1969). This Court handed down its decision in the *O'Callahan* case on June 2, 1969. It is submitted that *O'Callahan* should be given full retroactive effect so as to apply to petitioner's conviction even though that conviction had become final some six years prior to this Court's decision in *O'Callahan*.

The *O'Callahan* decision itself involved retroactive application of the principles enunciated. *O'Callahan* involved a habeas corpus petition, not an appeal; the original judgment against O'Callahan had become final some nine years before the collateral attack was begun. In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court recognized that *Gideon v. Wainwright*, 372 U.S. 335 (1963), a habeas corpus case like *O'Callahan*, was of necessity given retro-

supra. If there has been a significant effect on the integrity of that process the decision involved must be applied retroactively. See *Roberts v. Russell*, 392 U.S. 293 (1968); *McConnell v. Rhay*, 393 U.S. 2 (1968); *Berger v. California*, 393 U.S. 314 (1969). In *O'Callahan* the proscribed practice is the trial of a serviceman by a military tribunal which has no jurisdiction over the subject matter involved. It is well established that jurisdiction over the subject matter can neither be waived nor conferred by the consent of an accused. It is also well settled that the judgment of a court without jurisdiction is an absolute nullity. To give the proceedings of a tribunal any validity it must be competent to pass upon the subject matter of the suit. *Cf. Pennoyer v. Neff*, 95 U.S. 714 (1878). *O'Callahan*, therefore, involves much more than just a new and more expansive interpretation of the Bill of Rights. Rather, it goes to the very heart of the court-martial process—jurisdiction over the particular offense. The integrity of the fact-finding process by which petitioner was tried and sentenced is no less impugned by his conviction for an offense that the military had no power to try and punish him for than for an offense he did not commit. "In both situations the defect in the conviction, unlike that involved when illegally seized evidence is admitted or even when an improperly procured confession is received, goes to the very center of the legal justification for the punishment imposed." *Meadows v. United States*, 420 F.2d 795 (9th Cir. 1969).

This Court's emphasis on the importance of the integrity of the fact-finding process "is simply one frequently articulated aspect of its concern that all convictions, past and present, shall be the product of fundamentally fair proceedings." *United States v. Miller*, *supra* at 1103. Its concern that the proceedings be fundamentally fair is not restricted to its interest in protecting against the risk of convicting the innocent. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), this Court refused to conclude that the exclusion of jurors opposed to capital punishment substantially increases the risk of conviction. Yet this Court held that

ion standards in question "necessarily under-
the jury selection standards y integrity of the . . . process' that decided
mined 'the very integrity of fate . . . ." (391 U.S. at 523 n. 22) and gave
the petitioner's fate . . . ." (3n decision full retroactive application.
the Witherspoon decision fu bse of the *O'Callahan* rule is to correct an

As the purpose of the Cfact affects the very integrity of the fact-
abuse that in fact affects a purpose well served by retroactive appli-
finding process, a purpose *han* must be given full retroactive effect.
cation, *O'Callahan* must b reliance factor nor the impact of a retro-
Neither a strong reliance on the administration of justice will avoid
active holding on the adication in these circumstances. See *Wither-*
retroactive application in t, *supra*. The factors of the extent of
spoon v. Illinois, supra. sequent burden on the administration of
reliance and consequent to be considered when the purpose of the
justice are only to be con on does not clearly favor either retroactiv-
decision in question does ty. See *Roberts v. Russell, supra; Desist*
ity or prospectivity. See *supra*. Nevertheless, it should be noted
v. United States, supra. nanding prospective application of a new
that the cases demanding lved a much greater reliance factor than
rule generally involved a *Mapp* overruled *Wolf v. Colorado*, 338
does *O'Callahan*. *Mapp* n which numerous state authorities had
U.S. 25 (1949), on whi n *Tehan, Johnson* and *Stovall* this Court
relied. Similarly, in *Tel* ict that law enforcement officials had
emphasized the fact th ruled by the new decisions. By contrast,
relied on cases overrulec drastic overruling or reversal of a prior
O'Callahan is not a dras irt; *O'Callahan* is a case of first impres-
decision of this Court; at for many years courts-martial have
sion. It is true that f objection exercised jurisdiction over
apparently without ob itted by servicemen. Acquiescence is
civil offenses committe alent to approval and the fact remains
not, however, equivale this Court had never decided the basic
that until *O'Callahan* t gh to say that Congress has expressly
issue. It is not enoug se of the jurisdiction in question. In
authorized the exercis a, this Court declared unconstitutional
Toth v. Quarles, supra Congress which expressly authorized
a statute enacted by (y jurisdiction which the court-mar-
the exercise of the ve attempted to invoke. Yes, as pre-
tial had in that case did not hesitate to give the
viously noted, this Court

Toth decision retroactive effect. Moreover, the result in *O'Callahan* cannot be said to be completely unexpected. This Court has often made reference to the fact that the jurisdiction of military tribunals is to be strictly construed. See, *e.g.*, *Toth v. Quarles*, *supra*; *Lee v. Madigan*, 358 U.S. 228 (1959).[3]

O'Callahan is in other ways a strong case for retroactivity. *Linkletter v. Walker*, *supra*, refused to give retroactive effect to *Mapp v. Ohio*, *supra*, primarily because the purpose of *Mapp* was to deter police officials from making unreasonable searches, a purpose not served by applying the rule retroactively. *Johnson v. New Jersey*, *supra*, refused to give retroactive effect to the self-incrimination rules of *Escobedo v. Illinois*, *supra*, and *Miranda v. Arizona*, *supra*, in large part because habeas corpus would still be available to test the involuntariness of any self-incriminating statement. *Stovall v. Denno*, *supra*, refused to give retroactive effect to cases which proscribe the use of identification evidence in certain circumstances, primarily because the purpose of the rule was to deter future improper actions of law enforcement authorities. See also *Halliday v. United States*, 394 U.S. 831 (1969). *O'Callahan*, which goes to the very heart of a fair proceeding, stands in sharp contrast to all of these cases.

Prior to *Linkletter*, this Court had always, without discussion, applied new constitutional rules to cases finalized before the promulgation of the new rule. See, *e.g.*, *Eskridge v. Washington State Prison Board*, 357 U.S. 214 (1958). At common law there was no authority for the proposition that judicial decisions only applied in the future. Absent

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[3]In 1960 a now often-quoted article was published concluding that the drafters of the Constitution never intended courts-martial to displace the civilian courts as the instrument for trying offenses having no special relationship to the enforcement of military discipline. Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

special circumstances, judicial decisions affecting constitutionally guaranteed rights should be retroactive. Consequently, *O'Callahan* should be given full retroactive effect so as to apply to petitioner's conviction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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Date – July 3, 1970

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active application in the absence of a statement to the contrary. 381 U.S. at 628 n. 13. The cases most often cited for the proposition that this Court's decisions in the area of criminal constitutional law should not be given full retroactive effect—*Linkletter v. Walker, supra; Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); and *Stovall v. Denno*, 388 U.S. 293 (1967)—resolved the question of the retroactivity of prior decisions where the issue had been left open in the substantive case. The cases to which they respectively applied—*Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965); and *United States v. Wade*, 388 U.S. 218 (1967)—all involved direct appeals rather than petitions for a writ of habeas corpus, so that the issue of retroactivity was not part of those original decisions. *O'Callahan v. Parker*, by contrast, necessarily resolved the issue because it was applied to a final judgment.

Moreover, this Court has not hesitated in the past to order the full retroactive application of decisions limiting the jurisdiction of courts-martial. *Kinsella v. Krueger*, 354 U.S. 1 (1957), involved the court-martial conviction of the wife of an Army colonel for a 1952 murder. Her military appeal became final on December 30, 1954. See *United States v. Kinsella*, 137 F.Supp. 806 (1956). Yet this Court applied its decision in *Toth v. Quarles*, 350 U.S. 11 (1955) retroactively and permitted a writ of habeas corpus to issue. See also *Grisham v. Hagan*, 361 U.S. 278 (1960).

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court held that the states cannot deny a request for a jury trial in serious criminal cases. See also, *Bloom v. Illinois*, 391 U.S. 194 (1968). It is true that this Court subsequently held that the *Duncan* case should receive only prospective application. *De Stefano v. Woods*, 392 U.S. 631 (1968). However, this Court's holding in *De Stefano* should not be determinative of the question here involved. It is well established that the retroactivity or nonretroactivity of a decision does not depend upon the constitutional provision

upon which the decision is based. *Desist v. United States*, 394 U.S. 244 (1969); *United States v. Miller*, 406 F.2d 1100 (4th Cir. 1969). To the contrary, the choice between retroactivity and nonretroactivity must be determined in each case by looking to the peculiarities of the rule set forth in the substantive decision. *Johnson v. New Jersey*, *supra*. A reading of this Court's majority opinion in *O'Callahan* clearly indicates that while the right to trial by jury and the right to indictment by grand jury were the constitutional stakes in question, much more than those constitutional stakes was involved. *O'Callahan* involved not only the denial of those specific constitutional rights but also the subjection of an individual to military law, a body of law which "has always been and continues to be primarily an instrument of discipline, not justice." *O'Callahan v. Parker*, 395 U.S. at 266. Furthermore, in *De Stefano* this Court held that it would not reverse state convictions for failure to grant jury trials where trials began prior to the date of its decision in *Duncan v. Louisiana*, *supra*. Had this Court's decision in *O'Callahan* rested exclusively on the denial of O'Callahan's right to indictment by grand jury and trial by jury in civilian courts, it follows that this Court would not have granted O'Callahan the relief he requested because his court-martial trial had begun many years prior to the *Duncan* decision.

In terms of the three-pronged test for retroactivity laid down in *Linkletter v. Walker*, *supra*, and *Stovall v. Denno*, *supra*, *O'Callahan* is precisely the kind of case which must be given retroactive application. *Linkletter* and *Stovall* held that a decision as to the retroactivity of a particular case depends upon: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. Within the context of these criteria, this Court has often said that the crucial question is to what extent the proscribed practice has infected the integrity of the fact-finding process. See, *e.g.*, *Stovall v. Denno*,

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Comment, *O'Callahan* v. *Parker: Sounding the Death Knell of Military Justice?*, 7 San Diego L. Rev. 55 (1970) 19–20

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 98

ISIAH RELFORD, PETITIONER

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the district court (App. 30–32) is not reported. The opinion of the court of appeals (App. 35–37) is reported at 409 F. 2d 824.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1969. The petition for a writ of certiorari was filed on July 22, 1969, and was granted on February 27, 1970 (App. 39). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The grant of certiorari was "limited to retroactivity and scope of *O'Callahan* v. *Parker*, 395 U.S. 258" (App. 39). Accordingly, the questions presented are:

1. Whether the rule of *O'Callahan*, that only "service connected" crimes may be tried by court-martial, should be applied retroactively so as to invalidate convictions that became final before the date of that decision.

2. Whether the requisite service-connection exists when a serviceman is charged with kidnapping and rape on a military reservation in the United States where he is stationed.

STATEMENT

After a trial by general court-martial in December 1961, petitioner, then a corporal in the United States Army stationed at Fort Dix, New Jersey, was convicted on charges of kidnapping and raping two women in violation of 10 U.S.C. 920 and 934,[1] the crimes occurring within the boundaries of the military reservation. He was sentenced to be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death.[2] The Army Board of Review sustained the conviction but reduced the sentence to confinement at hard labor for thirty years,

[1] The charges of kidnapping were laid under the General Article (10 U.S.C. 934), kidnapping being one of the crimes not specifically mentioned in the Uniform Code of Military Justice.

[2] The death penalty is authorized by the Code for the crime of rape. See 10 U.S.C. 920(a).

the forfeitur honorable discharge. The Court
of Military enied a petition for review in
September 1 S.C.M.A. 687.

Four yea in October 1967, petitioner
brought a p habeas corpus in the United
States Dist for the District of Kansas,
alleging va in his conviction, including
lack of effe entation by counsel. The dis-
trict court e merits of petitioner's con-
tentions, a petition with a memorandum
opinion (The court of appeals af-
firmed on (App. 35–37; 409 F. 2d 824).
The petiti of certiorari sought to raise
the assist point in this Court, and also
challenge wy of the court-martial con-
viction ment of ts decision, after the judg-
supra; cals, in *O'Callahan* v. *Parker*,
O'Callah anted with respect to the

The ev

tember 4 at on the evening of Sep-
in New Futyma, who was on leave
bell, Ke rmy station at Fort Camp-
Fort Di Valson Army Hospital at
birth to re his wife had just given
old siste th him his fourteen year
and pa rrived at about 10:00 p.m.
Futym l parking lot. Specialist
only a pital, saying he would be
the ca semary remained alone in

[3] Petirned at about 10:20 p.m.

le on May 20, 1970.

Rosemary was not there (R. 28–30, 41).[4] Rosemary testified that, after her brother went inside, petitioner, in civilian clothing, appeared at the passenger side of the car, an open convertible. Brandishing a knife, he got in and told her to drive down the road. When Rosemary was unable to start the car, petitioner forced her to get out and walk down the road with him, placing his arm tightly around her neck. They walked behind some cottages, across a field and into a wooded area, where petitioner pushed Rosemary to the ground and forcibly raped her. Afterwards he left. Rosemary put on her clothes and ran to a house that had lights on, where she told the occupants that she had been raped. They called the military police, who took her back to Walson Hospital (R. 40–45, 47–50, 55–56; see App. 3–5).

With respect to the second kidnapping and rape, Mrs. Jackson, the wife of a member of the Air Force stationed at McGuire Air Force Base (adjacent to Fort Dix), testified that on the evening of October 21, 1961, she was driving alone from her home on the Base to the PX concession, also on the Base, where she worked as a waitress. When she halted at a stop sign, petitioner, in civilian dress, entered the car from the passenger side, put a knife to her throat, and said: "Be quiet and I won't hurt you". Petitioner directed her to drive to a dirt road in a training area on Fort Dix. There he forced Mrs. Jackson to remove her clothes and raped her (R. 68–73, 75–77, 81, 115; see App. 5–13). Subsequently, peti-

[4] "R." refers to the record of the court-martial proceedings, a copy of which is on file with the Clerk.

tioner directed Mrs. Jackson to drive to another part of Fort Dix; there, they happened upon a military police vehicle, and Mrs. Jackson managed to report the crime to the policemen. Petitioner was arrested and taken to the military police station where, after brief interrogation that evening and the next morning, he confessed to both crimes (R. 78–80, 101, 108, 110, 119–129, 132–133; see App. 13–17).

It is undisputed that at the time of these crimes petitioner Relford was stationed at Fort Dix and that all of the events involved took place on the military reservation encompassing Fort Dix and the contiguous McGuire Air Force Base.

ARGUMENT

INTRODUCTION AND SUMMARY

The radical change in the foundations of military justice announced at the end of the 1968 Term in *O'Callahan* v. *Parker* has, as the dissent predicted, presented difficult problems of defining concretely what offenses by servicemen may constitutionally be punished by court-martial under the "service connection" test established but not elaborated by this Court. The Court of Military Appeals has already decided a substantial body of cases involving the application of *O'Callahan,* and there have been several decisions in the lower federal courts. Through these decisions, we believe that a workable definition of some of the elements of the service-connection is slowly emerging. This case offers this Court an opportunity to consider these definitional problems, and also to answer the nagging question—of enormous practical import—

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whether the government is justified in its belief that *O'Callahan* cannot be used to reopen, on habeas corpus or more often in back-pay and similar collateral suits, the vast multitude of court-martial convictions based upon the principles of military jurisdiction prevailing before *O'Callahan.*

While it is evident that a decision in the government's favor on either of the two questions presented in this case would eliminate any technical necessity to decide the other, we urge the Court to decide both in the interest of the clarification that is urgently needed. We shall follow the pattern of petitioner's brief in discussing the question of scope first, but this is not to suggest that the retroactivity question is of any less importance.

At the outset, it may be helpful to outline the principles that are emerging from the decisions of the Court of Military Appeals and, to a lesser extent to date, the lower federal courts. Both the Court of Military Appeals and the several federal courts that have considered the question have agreed upon the principle that the *O'Callahan* rule does not apply to court-martial convictions that became final (by completion of review within the military system) before the date of that decision, June 2, 1969.[5] The Court of Military appeals has held that petty offenses do not fall within the scope of *O'Callahan,* since such offenses have tra-

[5] *E.g.*, *Mercer* v. *Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264; *Thompson* v. *Parker*, 308 F. Supp. 904 (M.D. Pa.), appeal dismissed, C.A. 3, No. 18,868, April 24, 1970; *Gosa* v. *Mayden*, 305 F. Supp. 1186 (N.D. Fla.); *Schloman* v. *Moseley*, D. Kans. No. L–1003, May 19, 1970.

ditionally not carried with them the Fifth Amendment rights underlying *O'Callahan*.[6] Both the Court of Military Appeals and the Court of Claims, as well as a number of district courts, have held that an off-duty, off-post crime committed overseas may be punished by court-martial;[7] last term, this Court denied certiorari in a case raising that question, *Swift* v. *Commandant*, 396 U.S. 1028, and it is raised again in the petition for a writ of certiorari in *Gallagher* v. *United States*, No. 392, this Term, in opposition to which we have stated the government's views as to overseas court-martial jurisdiction.

With respect to serious crimes committed within the United States—the general problem posed by the instant case—there have been few cases not involving the retroactivity question that have yet reached the lower federal courts; the only cases of which we are aware have applied a multi-factor approach that does not permit the statement of rules of thumb.[8] The Court of Military Appeals, which in the nature of things has had a greater volume of cases, appears to

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[6] *United States* v. *Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26.

[7] *E.g.*, *United States* v. *Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64; *Gallagher* v. *United States*, 423 F. 2d 1371 (Ct.Cl.); *Bell* v. *Clark*, 308 F. Supp. 384 (E. D. Va.).

[8] In *Silvero* v. *Chief of Naval Air Basic Training et al.*, C.A. 5, No. 28,419, decided July 13, 1970, the offense of sodomy committed off post by a naval officer on non-commissioned seamen was held to be triable by court-martial. In *Diorio* v. *McBride*, C.A. 5, No. 28,961, September 10, 1970, the same court held that use and possession of marihuana on post by an off-duty military policeman was subject to court-martial. In *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.), off-post possession of marihuana was held not service-connected.

have developed the rule that crimes committed by servicemen on post are, without more, sufficiently service-connected to justify court-martial;[9] as to off-post crimes, that court has considered a number of factors, case by case, including the military status of the victim and the role the offender's military status played in the crime.[10]

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[9] See, *e.g.*, *United States* v. *Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (assault and robbery of civilian taxi driver); *United States* v. *Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (sodomy in on-base housing); *United States* v. *Smith*, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (carnal knowledge in on-base housing); *United States* v. *Allen*, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (murder), *United States* v. *Paxiao*, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (wrongful appropriation of civilian-owned truck parked on base); *United States* v. *Hallahan*, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (cashing of forged check in bank located on post).

[10] Thus, while finding a lack of service connection as to some off-base crimes, *e.g.*, *United States* v. *Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (carnal knowledge of female under sixteen years in accused's apartment very near but outside base gate), *United States* v. *Borys*, 18 U.S.M.A. 547, 40 C.M.R. 259 (rape, robbery, and sodomy), the Court of Military Appeals has held that where the offense is committed against another serviceman, military jurisdiction under *O'Callahan* exists. *United States* v. *Nichols*, 19 U.S.C.M.A. 43, 41 C.M.R. 43, *United States* v. *Everson*, 19 U.S.C.M.A. 70, 41 C.M.R. 70. The Court has also decided in favor of military jurisdiction where it has concluded that the accused used his military status in order to facilitate commission of the offense. *E.g.*, *United States* v. *Peterson*, 19 U.S.C.M.A. 319, 41 C.M.R. 319; *United States* v. *Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19. In *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275, the court held that crimes involving the use, possession or delivery of marijuana or prohibited drugs on or off base were automatically "service connected" because of the "disastrous effects * * * on the health, morale and fitness for duty" of members of the armed forces of such crimes. In contrast, the Court of Military Appeals has

This case does not, of course, call upon this Court to consider the propriety of all of the judgments that have been made by the Court of Military Appeals and the lower federal courts in determining, case by case, what constitutes a sufficient service-connection in the many factual situations that have already arisen. Still less does it permit of the establishment of general rules that will govern all future cases; one of the serious practical problems created by the *O'Callahan* decision is the difficulty of formulating reasonably definite rules for the guidance of the many military commanders in various locations and the military judges before whom court-martials are tried in determining—as they must many hundreds of times every year [11]—whether particular servicemen should be court-martialed for particular offenses. This case does, however, permit the Court to consider the scope of *O'Callahan* in the concrete context of on-base crimes and also, we hope, to illuminate to some extent the kind of approach that can permissibly be taken to the complex general problem of definition.

The crimes involved in the instant case differ sharply from that found non-service-connected in *O'Callahan*. There, the crime took place in the civilian community away from the offender's post and the vic-

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held that jurisdiction over off-post crimes cannot be founded solely upon the dependent status of a victim. *United States* v. *Henderson*, *supra*; *United States* v. *McGonical*, 19 U.S.C.M.A. 94, 41 C.M.R. 94.

[11] The Army has estimated that in a recent year it alone conducted about 25,000 court-martials for offenses that might be argued to be non-service-connected, of which some 750 involved serious crimes.

tim had no military connection. Here, on the other hand, the crimes took place on the military reservation where petitioner was stationed (and both victims did have military ties—one as the wife of a serviceman, residing on the reservation and employed there, the other the sister of a serviceman). We urge that any crime by a serviceman jeopardizing the security of persons and property on his military installation is per se service connected, because of its elementary impact on the military mission; the more subtle weighing of the various other factors (which we outline in a preliminary way) pertinent to a determination of the service-connection of off-post crimes or non-physical crimes on post is accordingly not necessary to decide this case. Such a rule is implicit in the *O'Callahan* opinion itself and the history it relies on; it comports with the decisions of the Court of Military Appeals and the lower federal courts as well as the views of most commentators. Petitioner's suggestion that the court-martial power should extend only to situations where the offender has violated a uniquely military standard of behavior is inconsistent with the reasoning of *O'Callahan;* the constitutional authority for the "Government and Regulation of the land and naval Forces" surely encompasses more than simply the authority to arrest a member of the forces who jeopardizes the safety and security of his post and turn him over to civilian authorities (who have little natural interest in the problem) for prosecution; it must include the power to punish such a crime.

In any event, petitioner's conviction long preceded the date of the *O'Callahan* decision, and should not be

affected by it. The revolution in military justice occasioned by *O'Callahan* should not be made retroactive to upset countless court-martial convictions that have been rendered over many years under the mandate of Congress. The principles that this Court enunciated in *Stovall* v. *Denno,* 388 U.S. 293, 297, and has followed in numerous cases call for prospective application of *O'Callahan* for reasons closely similar to those that led to the decision in *DeStefano* v. *Woods,* 392 U.S. 631, that the imposition of jury trial requirements upon the States should not be retroactive. In terms of the first *Stovall* criterion—the purpose of the new rule—it cannot be said that courts-martial are inherently so unfair that no past conviction for a non-service-connected crime can stand; we point out briefly some of the protections for the accused inherent in the court-martial system. Just as the jury right in question in *DeStefano* did not invalidate past non-jury trials, so also the jury (and grand jury) rights that underlie the *O'Callahan* decision do not invalidate past court-martial trials. Moreover, the other two *Stovall* factors—reliance by the military upon the law as it was before *O'Callahan* and the practical impact that retroactivity would have—are unusually strong in the present context. Court-martials for non-service-connected crimes (as that term is used in *O'Callahan*) have gone on for many years with strong support from a previously unbroken line of decisions in this Court and with the express authorization of decisions in the lower federal courts.

Retroactively overturning these convictions would not only free hundreds of those properly imprisoned

under the law at the time of their convictions, but would also result in voluminous civil litigation for correction of military records, back pay and the like. In many such cases it would be extremely difficult, if not impossible, to reconstruct all of the facts from which service connection could be determined, to say nothing of the problems of marshalling the evidence that would be required for retrials in civilian courts. Thus here, as in *DeStefano,* the practical considerations require prospectivity and the purpose of the new rule permits it, as the Court of Military Appeals and lower federal courts have held. Nor does the shibboleth that *O'Callahan* is "jurisdictional" warrant automatic retroactivity; here, as in other retroactivity cases the question is whether a new trial right should be applied to old trials and analysis can proceed intelligently only by considering the criteria that have governed those cases. Accordingly, the rule adopted by the Court of Military Appeals—that no conviction that had become final by the exhaustion of military review procedures before June 2, 1969, will be disturbed under *O'Callahan*—is constitutionally permissible and should be followed.

I. AN OFFENSE BY A SERVICEMAN THAT DIRECTLY JEOPARDIZES THE PHYSICAL SECURITY OF A MILITARY BASE IS "SERVICE CONNECTED"

This Court held that Sergeant O'Callahan could not constitutionally be court-martialed for his off-duty, off-post attack upon a civilian girl because "[t]here was no connection—not even the remotest one—be-

tween his military duties and the crimes in question"; the Court's opinion pointed out, among other things (395 U.S. at 273–274), that O'Callahan

> * * * was properly absent from his military base when he committed the crimes with which he is charged. * * * *The crimes were not committed on a military post or enclave;* nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.
>
> Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, *the security of a military post,* or the integrity of military property. [Emphasis added; footnote omitted.]

This case, however, is very different from *O'Callahan.* Petitioner's offenses—kidnapping and raping two women on the military reservation where he was stationed—did involve "the security of a military post" directly. We submit that any such crime affecting the physical safety of persons and property on a military base is per se service-connected, whatever the outer limits of service-connection may be.

Such a rule is suggested not only by implication from this Court's language in *O'Callahan* but also by the history to which the opinion refers. In discussing the "general article" which in the early years (be-

ginning in 1775) was the basis for court-martial jurisdiction over crimes not military in the narrow sense, Winthrop's standard treatise on military law stated:

> A crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer, and manslaughter, assault with intent to kill, mayhem, or battery, committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians,* and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.

Winthrop, *Military Law and Precedents* (1920 War Department Reprint) 1124–1125. The *O'Callahan* opinion quotes this passage with apparent approval (395 U.S. at 274, n. 19; see also *id.* at 278–279 (Harlan, J., dissenting)).

Even on the narrowest view, we submit, there is a plainly identifiable military interest in the security of persons having business on a military post from physical attack by servicemen on that post; there is a similar strong interest in the protection of property

on the post. The commander of a military installation clearly has the responsibility and authority to maintain law and order in his command. Army Regulation 210–10(13); see *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886; *United States* v. *Jelinski*, 411 F. 2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Weissman* v. *United States*, 387 F. 2d 271 (C.A. 10). It follows that the military—through its court-martial procedures—must be able to punish behavior by a serviceman that disrupts the physical security of the military environment in which he works and lives and thus tends to jeopardize the ability of the command to carry out its military mission. That mission necessarily goes on around the clock, and there is no basis on which a post can be rationally segregated into military and non-military areas for law-enforcement purposes; obviously, the military mission is seriously hampered unless commanders can assure that persons can move freely and safely about military installations at any hour, and can assure that all property on the post is secure. Nor is there any significance in this context to the question whether the offender is technically on duty or not; so long as he is in military service and remains on post, he necessarily remains subject to such elementary regulation by his commander.

We note further that the facts of this case involve an additional factor properly of concern to the military. One of petitioner's victims (Mrs. Jackson) was the wife of a serviceman also stationed on the military reservation, and she both lived and herself

worked on the reservation; the other (Miss Futyma) was the sister of a serviceman who had business on the post arising out of his military status. While we agree with the Court of Military Appeals that the dependent status of a victim is not necessarily enough by itself to establish court-martial jurisdiction, it is obviously a significant factor. See Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan* v. *Parker,* 54 Minn. L. Rev. 1, 30 (1969) (hereafter Nelson and Westbrook). The morale and hence effectiveness of the military establishment is clearly impaired if the military cannot assure the personal security of its members' families on military property. While this factor underlines the service connection in this particular case, we do not think that it should be necessary to rely upon it. Rather, in the interest of establishing rules that are as clear and easy of application as possible, we urge the Court to hold that the fact that a crime against person or property took place on a military reservation is alone enough to warrant court-martial of the offending serviceman.

Petitioner's brief suggests that court-martial jurisdiction should exist only when a serviceman has violated a rule of conduct that establishes a uniquely military standard; in other words, he appears to suggest that the Constitution forbids the military to punish any behavior that also violates civilian law. This suggestion misconceives the Court's clear holding in *O'Callahan* and would render much of the reason-

ing there superfluous. There would have been no need for the Court in *O'Callahan* to spell out the various factors to show no service connection (including the off-base location of the offenses and the fact that victim there was performing no duties relating to the military) if it had been enough to note that O'Callahan's crimes were (like those here) not purely military but of a kind punishable traditionally by the common law. The need to maintain discipline and morale, particularly with respect to often isolated communities and bases administered by military authority, requires more in the way of court-martial jurisdiction than the ability to prosecute only those violations of the military code enacted by Congress that arise solely from the offender's military status. The test laid down by this Court in *O'Callahan,* we submit, recognizes this need.

It is not enough to say, as petitioner does (Brief, p. 10) that the military interest in a serviceman's on-post crimes can be vindicated by turning the offender over to a state or federal court for prosecution.[12] In the first place, it is not clear to us why, as a matter of allocation of governmental responsibility, a local court and jury should be expected to vindicate the military's disciplinary problems with its own personnel in its own community. More fundamentally, a natural reading of the constitutional mandate for the "Government and Regulation of the land and naval

[12] Because of the different status of different parcels of real estate used for military bases, state law would apply in some and federal law in others, with differences in some cases among areas of the same post.

Forces" surely connotes more than a limited military authority to hold a serviceman guilty of a crime against person or property on his own post for prosecution by civilian authorities; "Government" and "Regulation" necessarily carry with them the power to punish and not simply the power to arrest and accuse.

As we have noted, the Court of Military Appeals has apparently developed a general principle that any crime actually committed by a serviceman on post is triable by court-martial; specifically, that court has endorsed court-martials for cashing forged checks at on-post facilities. See p. 8, *supra*. While under all the circumstances, adequate service connection may well exist in such cases, the per se principle we advocate as the basis for deciding the scope question in this case need not go so far. Rather, we would define the governing principle here as covering crimes against the person or against tangible property—crimes which directly implicate the physical security of the post. Thus petitioner errs in asserting (Brief, pp. 10–11) that for the Court to place conclusive weight on the on-base location of *his* offenses necessarily means that the Court would be lending its imprimatur to the exercise of court-martial jurisdiction over a tax fraud prosecution where "a serviceman executed his tax return in on-post housing rather than in the nearby community." Whether or not the rationale of the Court of Military Appeals' bad-check decisions would include the tax-evasion spectre, that issue need not be reached here.

In our view, cases involving tax evasion and other kinds of offenses that may originate on post, as well as

cases involving off-post civil-type crimes within the United States, will have to be decided by the consideration of a number of factors that may or may not converge in a particular case. Among these factors are the following: the status of the victim (military, dependant or otherwise) and perhaps that of any partners in crime; whether the offender was on duty at the time of the crime; whether the offender was in uniform or his military status was in some way especially pertinent to the crime or facilitated it; whether the offense had some special characteristic tending to cast discredit upon the military; whether there is some special military need for retaining custody of the accused (*e.g.*, a port offense by a member of a ship's crew); whether the offense occurred in peacetime or wartime. This enumeration of factors is not necessarily either exhaustive or precise; it may be hoped that as future cases accumulate broader rules of thumb will evolve for the guidance of courts and commanders, but this case does not appear to require or permit such a broad set of guidelines.[13]

We note that the lower federal courts that have been confronted with *O'Callahan* problems have decided them in terms of factors such as those we have suggested, and that the Court of Military Appeals has approached the off-post cases in a similar manner. See pp. 7–9, *supra*. And the suggestions of the commentators are generally consistent with the approach we take here. See, *e.g.*, Comment, *O'Callahan* v. *Parker:*

[13] It is further the government's position that crimes committed overseas and petty offenses may be tried by court-martial and that an accused may waive his right to a civilian trial.

Sounding the Death Knell of Military Justice?, 7 San Diego L. Rev. 55, 69–71 (1970); Comment, *O'Callahan* v. *Parker, A Military Jurisdictional Dilemma*, 22 Baylor L. Rev. 64, 71–72 (1970). In perhaps the most thoughtful and comprehensive article on *O'Callahan* to be written to date, Nelson and Westbrook offer a set of relevant factors similar to those we have suggested, concluding that some of the factors enumerated "are entitled to greater weight than others and that the importance of a factor may vary according to the offense * * *." 54 Minn. L. Rev. at 32. As an example, they state: [C]ourt martial jurisdiction should exist over most offenses committed on a military reservation. Even if an off duty serviceman murders a civilian who happens to be traveling through the post, the necessity of maintaining the peace and order of the post is enough to sustain jurisdiction." *Ibid.* That is the government's position in this case, and we urge the Court to adopt it as as one clear rule that may somewhat ease the practical burden of applying *O'Callahan*.

II. THE LIMITATIONS UPON THE COURT-MARTIAL POWER NEWLY ESTABLISHED IN O'CALLAHAN V. PARKER SHOULD NOT BE APPLIED RETROACTIVELY TO UPSET CONVICTIONS THAT BECAME FINAL BEFORE THE DATE OF THAT DECISION

In *O'Callahan*, this Court held for the first time that the exception to the Fifth Amendment guarantee of indictment and trial by jury for "cases arising in the land or naval forces" refers only to those cases involving "service connected" offenses and not, as it had

been generally believed, to all offenses by members of the armed forces. In so holding, the Court made unconstitutional in part the express statutory provisions of the Uniform Code of Military Justice making acts not necessarily service-connected punishable by court-martial. Those provisions of the Code have direct statutory antecedents going back to 1916 and, through the general article, back to the beginning of the Republic (see our Brief in *O'Callahan* at pp. 11–16, 20–24). Thus, in practical terms, *O'Callahan* has required a broad scale revamping of the processes of military justice. We submit that this change in basic court-martial law should be treated as prospective only, and should not be the basis for upsetting countless court-martial convictions that became final prior to June 2, 1969, when *O'Callahan* was decided. Specifically, petitioners' conviction, which was rendered in 1961 and became final when the Court of Military Appeals denied review in 1963, should stand even if his crimes be deemed non-service-connected.

At the outset, we point out that the position we urge on retroactivity has been reached by the Court of Military Appeals, in its comprehensive and careful opinion in *Mercer* v. *Dillon,* 19 U.S.C.M.A. 264, 41 C.M.R. 264, by the lower federal courts where the question has arisen (see p. 6, n. 5, supra) and by most of the commentators, *e.g.* Nelson and Westbrook, 54 Minn. L. Rev., at 39–46; Note, *Court-Martial Jurisdiction Limited to "Service-Connected" Cases,* 44 Tulane L. Rev. 417, 423–424 (1970).

In *Stovall* v. *Denno,* 388 U.S. 293, 297, this Court stated the considerations that affect the judgment

whether particular cases creating new constitutional principles of criminal law should be applied only prospectively:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. * * *

These considerations require non-retroactive application of the *O'Callahan* rule for reasons quite similar to those underlying the determination in *DeStefano* v. *Woods,* 392 U.S. 631, applying these standards, that the jury trial requirements imposed upon the States by *Duncan* v. *Louisiana,* 391 U.S. 145, and *Bloom* v. *Illinois,* 391 U.S. 194, should be prospective only. In *DeStefano,* the Court evaluated the first criterion, the purpose of the new rule, as follows in the jury trial context (392 U.S. at 633–634):

> *Duncan* held that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan,* "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never by as fairly treated by a judge as he would be by a jury." 391 U.S., at 158. The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. * * *

Similarly, we submit, the Court's basic concern in *O'Callahan* to give servicemen who commit non-service connected crimes the right to jury trial in a civilian court is not to be taken as resting upon a determination that all court-martial convictions are inherently unfair. See *Gosa* v. *Mayden, supra,* 305 F. Supp. at 1187; *Thompson* v. *Parker, supra,* 308 F. Supp. at 908; Nelson and Westbrook, *supra,* 54 Minn. L. Rev. at 42–43. The "constitutional stakes" (*O'Callahan,* 395 U.S. at 262) in this case are essentially the same as in *DeStefano*—the right to jury trial [14]—and the purpose element as well as the reliance and effect factors to be discussed *infra,* militate in favor of the same result.

Following the same line of analysis, the Court of Military Appeals in *Mercer* v. *Dillon, supra,* observed that evaluation of the consistency of non-retroactive with *O'Callahan's* purpose did not call for it to "reargue the merits of that decision by emphasizing the extensive statutory and judicial protections an accused in the armed forces enjoys." It did, however, consider it pertinent to point out, *inter alia,* that frequently

> the composition of a court-martial is for a member of the armed forces more nearly a jury of his peers than is a civilian panel in a State where the member may be involuntarily stationed.

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[14] *O'Callahan* also speaks of the right to indictment by grand jury. However, this appears to be a less crucial factor since that provision of the Fifth Amendment has never been held binding upon the States. *Gaines* v. *Washington,* 277 U.S. 81, 86; *Hurtado* v. *California,* 110 U.S. 516.

And, with respect to the absence of grand jury indictment, the court observed the unusual protections given a serviceman in the comparable pretrial investigation under 10 U.S.C. 832, where he has a right to counsel, to present exonerating evidence and to cross-examine witnesses. 19 U.S.C.M.A. at 266, 41 C.M.R. at 266. It is not necessary to elaborate further the substantial protections given accused servicemen, which upon analysis dispel any notion that courts-martial are inherently unfair.[15]

The Court of Military Appeals itself, the judges of which are "appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years" (10 U.S.C. 867), has consistently and fairly reviewed court-martial convictions for constitutional and other error and is, like civilian courts, wholly free of the possibilities of command influence that underlie many attacks on military justice. And we point out the availability of review in the federal courts on habeas corpus to determine that the military tribunals have given fair consideration to a convicted serviceman's basic rights. *Burns* v. *Wilson,* 346 U.S. 137; see *United States* v.

[15] See Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. Rev. 1240 (1968): Nelson and Westbrook, *supra*, 54 Minn. L. Rev., at 57–58, quoting *inter alia* from Chief Justice Burger's dissenting opinion in *United States ex rel. Guagliardo* v. *McElroy*, 259 F. 2d 927, 940 n.29 (C.A.D.C.), referring to the "universal recognition of the UCMJ as the most enlightened military code in history and as [one] affording the basic elements of fairness." See also Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188–189 (1962).

Augenblick 393 U.S. 348; *Gallagher* v. *United States, supra.*

In any event, we believe that the Court of Military Appeals in *Mercer* was correct in going on to hold that *O'Callahan* should not apply retroactively even if the Court cannot say without qualification that no purpose of the new rule would be served by applying it to old convictions.[16] See also Nelson and Westbrook, 54 Minn. L. Rev at 46. This is so because of the unusually strong compulsion of the two other factors—reliance and impact—in the court-martial situation.

Just as the "States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States" (*DeStefano,* 392 U.S. at 634), so also the military authorities and Congress have relied upon the previously unques-

[16] Although purpose is the "foremost" of the three factors, see *Desist* v. *United States*, 394 U.S. 244, 249, this Court has noted that it has in the past denied retroactivity in areas where the purpose criterion offered little support. Thus in *Desist* (*id.* at 249–250 n.14) the Court referred to:

"*Stovall* v. *Denno*, 388 U.S. 293, 298, where it was conceded that "the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence; *Johnson* v. *New Jersey*, 384 U.S. 719, 730, where it was recognized that "*Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation"; and *Tehan* v. *Shott*, 382 U.S. 406, 414, where it was stated that "the 'purpose' of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents," including "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" Id. at 414–415, n.12."

tioned constitutionality of those provisions of the Uniform Code of Military Justice that provide expressly for court-martial jurisdiction over non-service-connected crimes by servicemen. Even accepting the *O'Callahan* majority's implicit disclaimer that it was overruling any specific prior decisions (395 U.S. at 267; but see Harlan, J., dissenting, at 275),[17] it remains the fact that military authorities have long exercised court-martial jurisdiction over all crimes by servicemen and that there was not the slightest indication in this Court's pre-*O'Callahan* opinions that they were wrong in doing so; those opinions certainly supported a reasonable inference that military status by itself was enough to permit court-martial. See, *e.g.*, *Ex Parte Milligan*, 4 Wall. 2, 123; *Coleman* v. *Tennessee*, 97 U.S. 509; *Smith* v. *Whitney*, 116 U.S. 167, 184–185; *Johnson* v. *Sayre*, 158 U.S. 109, 114; *Grafton* v. *United States*, 206 U.S. 333, 348; *Reid* v. *Covert*, 354 U.S. 1, 22–23; *Kinsella*

[17] Clearly the fact that a decision does not overrule prior precedents does not mandate retroactive application. The Court has stated that the *Stovall* standards apply to "the judgment whether a case *reversing prior doctrines* in the area of the criminal law should be applied only prospectively." *DeStefano* v. *Woods*, 392 U.S. at 633 (emphasis added). Plainly, a reversal of "prior doctrines" may occur (as we contend it did here) irrespective of whether any specific case was overruled. In *Mordecai* v. *United States*, C.A.D.C. No. 21,943, decided October 7, 1969, certiorari denied, 397 U.S. 977, the court declined to give retroactive effect to this Court's decision in *Kent* v. *United States*, holding that a juvenile facing waiver was entitled to a hearing and the assistance of counsel, notwithstanding that *Kent* had not purported to overrule any previous decisions of this Court. See also this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719.

v. *Singleton*, 361 U.S. 234, 240–243; see also our brief in *O'Callahan* at 8–16, 20–25; opinion of Harlan, J., dissenting, 395 U.S. at 278–280.

The lower federal courts that had squarely faced the *O'Callahan* contention had uniformly rejected it. *E.g.*, *Burns* v. *Taylor*, 274 F. 2d 141 (C.A. 10), certiorari denied, 364 U.S. 837; *Owens* v. *Markley*, 289 F. 2d 751 (C.A. 7); *Wright* v. *Markley*, 351 F. 2d 592 (C.A. 7); *Thompson* v. *Willingham*, 318 F 2d 657 (C.A. 3); *O'Callahan* v. *Chief United States Marshal*, 293 F. Supp. 441 (D. Mass.).[18] Beyond doubt, as the court indicated in *Mercer* v. *Dillon*, 19 U.S.C.M.A. 264, 266–267, 41 C.M.R. 264, 266–267:

> The result in *O'Callahan* had not been foreshadowed in other opinions. Before *O'Callahan* the armed forces had absolutely no hint that such considerations as the nature, time, and place of the offense might limit trials by court-martial. * * *

See also Nelson and Westbrook, 54 Minn. L. Rev. at 24, 43. Certainly, when petitioner was court-martialed

[18] As petitioner notes (Pet. Br., p. 18), the sole portent of the result reached in *O'Callahan* was an article published in 1960 (Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435), and the authors there based their view on a theory of the "necessary and proper" clause of the Constitution which this Court had rejected in *Reid* v. *Covert*, 354 U.S. 1, and which *O'Callahan* did not purport to revive. The thrust of the article was that the necessary and proper clause was a substantive provision limiting the grant of power to Congress in Article I, Section 8, Clause 14 of the Constitution to "make Rules for the Government and Regulation of the land and naval forces", and that only such civilian offenses as had a military connection could appropriately be deemed "necessary and proper" to court-martial jurisdiction.

in 1961 and the military review process ended in 1963 neither the military officials nor the Court of Military Appeals had reason to think that on post crimes such as petitioner's were not subject to military punishment.

Finally, it is manifest that a retroactive application of *O'Callahan* would have a gravely disruptive "effect on the administration of justice" (the third *Stovall* factor). When the ruling in *O'Callahan* was rendered, the Army Judge Advocate General stated that since 1951 (following passage of the Uniform Code of Military Justice) the Army alone had court-martialed approximately 1.3 million men and estimated that there were 450,000 courts-martial which might be invalid under *O'Callahan*. He further stated that approximately 4000 men in the combined services were in prison at that time but that lawsuits would not be limited to those in prison because presumably actions would be filed relating to other punishments and involving back pay, veterans' benefits and other collateral matters. See Nelson and Westbrook, 54 Minn. L. Rev., at 39–40; see also *Gallagher* v. *United States*, 423 F. 2d 1371 (Ct. Cl.). The Court of Military Appeals observed in *Mercer* v. *Dillon*, 19 U.S.C. M.A. 264, 268, 41 C.M.R. 264, 268:

> For the one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial. If only the smallest fraction of these courts-martial and those conducted in the other years since 1916 involved an *O'Callahan* issue,

> it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans' benefits. * * *

Thus the effect on the military and federal judiciary of a holding of full retroactivity of *O'Callahan* would be staggering in terms of the sheer number of cases it would spawn.

Nor is the volume of retroactive *O'Callahan* claims that would be made the only problem. There are likely to be numerous instances in which the elements of service-connection cannot be determined from a stale record or even from a *de novo* hearing, since a number of the factors pertinent to this special inquiry (see p. 19, supra) may not appear in a normal trial record. The magnitude of this problem is seen when it is considered that discharge-correction and back-pay suits may be brought long after any sentence has been completed. Moreover, especially in the more serious cases (involving longer sentences), the lapse of time may be such that retrial in a civilian court is not practicable. Nelson and Westbrook note "the rapid turnover in military personnel and the fact that military people are transferred frequently renders the gathering of witnesses and evidence even more difficult than the already formidable task faced in this regard by civil courts." 54 Minn. L. Rev. at 44.

In *DeStefano* the Court attached great weight to the fact that (392 U.S. at 634):

> the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee.

Precisely the same kind of problem is presented for both military and civilian authorities by the prospect that thousands of past court-martial convictions would be upset by retroactive application of *O'Callahan*. Consequently, the Court should give the new doctrine of *O'Callahan* v. *Parker* only prospective effect.[19]

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[19] Petitioner apparently contends that this Court has already resolved the retroactivity issue by according relief to O'Callahan himself in a case on collateral attack (Pet. Br. 13–15). The argument, however, is neither novel nor sound. As the Court stated in *Desist* v. *United States*, 394 U.S. 244, 254–255, n. 24, in rejecting a similar contention as to the retroactivity of *Katz* v. *United States*, 389 U.S. 347:

"Of course, Katz himself benefited from the new principle announced on that date, and * * * to that extent the decision has not technically been given wholly prospective application. But, as we recently explained in *Stovall* v. *Denno*, 388 U.S. 293, 301, the fact that the parties involved in the decision are the only litigants so situated who receive the benefit of the new rule is 'an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.' Whatever inequity may arguably result from applying the new rule to those 'chance beneficiaries' is 'an insignificant cost for adherence to sound principles of decision-making.'" *Ibid.*

The fact that O'Callahan's conviction was reversed as a result of the *O'Callahan* holding, therefore, has no impact on the issue whether that decision is to be applied with general retroactive effect.

There is in petitioner's brief some suggestion of an argument that *O'Callahan* is a "jurisdictional" decision and ipso facto must be retroactive because "the judgment of a court without jurisdiction is an absolute nullity" (Petitioner's Brief, p. 16). Any such conceptual approach amounts, however, to mere playing with words and ignores both the rationale of *O'Callahan* and the realistic issue in this case. To be sure, the *O'Callahan* opinion uses the term "court-martial jurisdiction" here and there, and we have used the same term from time to time in this brief as a short-hand expression. But the real basis of *O'Callahan* was, as we have stated, the conclusion of a majority of this Court that, under circumstances not amounting to service-connection, the normal court-martial jurisdiction over servicemen cannot be exercised so as to take away their Fifth Amendment rights to indictment and trial by jury. The fact that the effect is to require that certain charges be tried in civilian rather than military courts makes the issue no more "jurisdictional" in any magical sense than did the fact that *Duncan* v. *Louisiana, supra,* required States to try certain kinds of crimes in courts with juries rather than other courts. The issue is simply—as in many of the other retroactivity cases—whether a new trial right should be given to those already tried; as we have indicated, this issue is to be resolved by application of the same criteria that governed those cases.[20] And

[20] Petitioner also points to the fact that this Court's decisions denying the armed services any power to court-martial persons not having military status have been applied retroactively (Petitioner's Brief, p. 14). In the first place, the retroactivity

even in cases that are jurisdictional in a more conventional sense, the courts have properly rejected arguments that retroactivity must inexorably follow. *McSparran* v. *Weist,* 402 F. 2d 867 (C.A. 3), certiorari denied, 395 U.S. 903; *Lester* v. *McFaddon,* 415 F. 2d 1101 (C.A. 4).

There remains, finally, the matter of where the cutoff point lies, if we are correct in our position that *O'Callahan* should be prospective only. As a constitutional matter, we would urge that *O'Callahan* should apply only to cases where the actual court-martial trial began after the decision date, June 2, 1969, making no distinction between cases pending on appellate review and those where the appellate processes had been exhausted. Such a rule would be consistent with this Court's recent retroactivity opinions, which have consistently rejected any such distinction as philosophically untenable, opting in favor of either full retroactivity or full prospectivity. *Desist* v. *United States,* 394 U.S. 244, 252–253; *DeStefano* v. *Woods,* 392 U.S. 631, 635, n. 2; *Stovall* v. *Denno,* 388 U.S. 292, 300–301. See our brief in *Williams* v. *United States,* No. 81, this Term. The Court of Military Appeals has, however, taken a different approach, applying *O'Callahan* to cases that were still subject to appellate review within the military system on June 2, 1969. *E.g., United States* v. *Borys,* 18 U.S.C.M.A. 547, 40 C.M.R.

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question has never been argued in this context. Moreover, the considerations pertinent to a decision that the military may not punish a civilian are quite different from those pertinent to a decision that the undenied power to punish servicemen must be restricted.

259; see *Mercer* v. *Dillon, supra,* 19 US.C.M.A. at 265, 41 C.M.R. at 265. Since the Court of Military Appeals has articulated no constitutional rationale for this limited retroactive application, it must be deemed to be an exercise of its special supervisory power over the administration of military justice, a power that is not subject to review here. Accordingly, it is not necessary for this Court to consider the problem of convictions still in the military appellate process when *O'Callahan* was decided; rather, the question here is only whether the rule established by the Court of Military Appeals—which we believe should also be followed by the civilian courts—is constitutionally permissible. For the reasons we have given, we submit that it is, and that *O'Callahan* should govern only those cases where court-martial convictions have become final since June 2, 1969.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 98

ISIAH RELFORD,

Petitioner,

v.

COMMANDANT, U.S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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No. 98

ISIAH RELFORD,

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COMMANDANT, U.S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

THE FACTS OF THIS CASE FALL WITHIN THE SCOPE OF THIS COURT'S HOLDING IN O'CALLAHAN v. PARKER

While seeming to tacitly admit that all on-post crimes are not automatically service-connected, respondent urges this

Court to adopt a rule that any crime committed by a serviceman "affecting the physical safety of persons and property on a military base is *per se* service-connected . . ." within the meaning of this Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969). (Brief for the Respondent, page 13; see also Brief for Respondent, page 16.) In an attempt to justify its position, respondent submits that the military has an interest in the security of persons and the protection of property on a military installation, and that the commander of a military installation has the responsibility and authority to maintain law and order in his command. (Brief for Respondent, pages 14 and 15). Based on this reasoning, respondent concludes that the military must be able to determine the guilt or innocence of a serviceman accused of behavior that disrupts the physical security of a military installation and must be able to punish servicemen guilty of such behavior. It is submitted that respondent's conclusion does not logically follow its reasoning and is inappropriate when considered in the context of this Court's decision in *O'Callahan*.

Petitioner does not contest that the military has an interest in the security of persons and property on a military installation nor that the commander of a military installation has the responsibility and authority to maintain law and order in his command. However, these factors do not demand court-martial jurisdiction of all on-post crimes. Crimes involving a level of conduct required only of servicemen, military crimes, are the types of offenses in which the military's interest in maintaining discipline may be compelling. Not being cognizable in civilian courts, these offenses must be dealt with by the military authorities. By their very nature, military crimes may involve situations calling for a "prompt, ready-at-hand means of compelling obedience" if military discipline is to be maintained. *Toth v. Quarles*, 350 U.S. 11 at 22 (1955). In addition, military personnel "may be especially competent to try soldiers for infractions of military rules." *O'Callahan v. Parker, supra*, at 263. However, offenses committed by servicemen which

are not uniquely military in nature and are cognizable in open and functioning civilian courts, whether committed on- or off-post, could and should be tried in civilian courts without any prejudice to military discipline. Such crimes will not go unpunished. Their punishment will simply be determined by civilian rather than military courts. Furthermore, these crimes do not by their nature require military action or trial by military personnel. The military interest in the maintenance of law and order on the military installation is served in the case of on-post, non-military crimes by the apprehension and arrest of the accused. Consequently, it does not follow that the military must be able to subject servicemen to trial by court-martial and military punishment for the commission of on-post civilian crimes in order to adequately serve its interest in the maintenance of law and order on a military reservation.

The cases cited by respondent for the proposition that the commander of a military installation has the responsibility and authority to maintain law and order in his command, *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *United States v. Jelinski*, 411 F.2d 476 (5th Cir. 1969); and *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967), do not support respondent's conclusion. These cases stand for the proposition that the commanding officer of a military installation has the power to bar a civilian from that military installation without prior notice or hearing. They do not stand for the proposition that the military commander has the power or even the need to punish illegal behavior occurring in his command in order to maintain law and order. It is true that the individuals involved in these cases were civilians rather than servicemen. However, in the context of a civilian crime, the fact that the criminal is a serviceman does not alter the interest of the military in the security of persons and property on a military reservation. This Court's opinion in *O'Callahan* makes it clear that "the fact that courts-martial have no jurisdiction over non-soldiers, whatever their offense, does not necessarily imply that they

have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged." 395 U.S. at 267. The nature of the crime involved must create an immediate need for military disciplinary action. There is no such need in the context of a non-military crime cognizable by civilian courts. Furthermore, it should be noted that the Defense Department presently employs approximately 1,083,868 civilians in the United States. See Selected Manpower Statistics, Department of Defense, April 15, 1970 at page 68. There are presently approximately 3,434,915 United States military personnel throughout the world. *Id.* at page 37. These servicemen have approximately 4,359,652 civilian dependents who either live on or have access to military installations within the United States. *Id.* at page 37. It is well established that the military courts have no jurisdiction over civilians employed by the military and civilian dependents of servicemen. See *Grisham v. Hagan*, 361 U.S. 278 (1960); *Reid v. Covert*, 354 U.S. 1 (1957). It is difficult to see how the security of persons and property on a military installation demand court-martial jurisdiction over a serviceman's on-post crimes when almost half of the military community is not in any event subject to that jurisdiction.

In light of their essential nature and the limited nature of their jurisdiction, this Court recognized in *O'Callahan* that the justification for the system of specialized military courts rests solely on the "special needs of the military" and that, consequently, the jurisdiction of courts-martial must be limited to the "least possible power adequate to the end proposed." 395 U.S. at 265. As considerations of military discipline and effectiveness do not require military military jurisdiction over civilian crimes merely because they are committed on a military installation, extension of military jurisdiction to cover these crimes falls without the "least possible power adequate to the end proposed" concept of the *O'Callahan* decision.

Respondent's suggestion that petitioner's position would forbid the military to punish any behavior that also violates civilian law misconceives petitioner's argument. (See Brief for Respondent, page 16). One act may result in separate offenses, one military and the other civilian. For example, assaulting a superior commissioned officer may constitute both a violation of 10 U.S.C. § 890 (Art. 90, Uniform Code of Military Justice) and the common-law crime of assault. Petitioner's argument would not forbid military jurisdiction over the military crime involved. The military's interest in preserving *military* discipline will not be affected.

Even though limited to on-post crimes directly jeopardizing the physical security of military installations, respondent's position will lead to the use of military installation boundaries as a dividing line between civilian and military jurisdiction without the need for an analysis of the nature of the offense (other than whether it jeopardizes the security of the military installation), the effect of the offense on the special needs of the military or any other factors. Respondent's contention will, therefore, not avoid the arbitrary nature of jurisdiction based on an on-post/off-post dichotomy. (See Brief for Petitioner, page 11.) In addition, respondent's position will in no way eliminate any confusion which has arisen since *O'Callahan* in the context of off-post crimes. Petitioner's position is not only totally consistent with the rationale of *O'Callahan*, it is also a rational and workable approach to the problem of court-martial jurisdiction.

II.

O'CALLAHAN v. PARKER SHOULD BE GIVEN FULL RETROACTIVE EFFECT

Respondent urges that this Court's decision in *O'Callahan v. Parker* should be given partial retroactive effect in that it should not affect those cases where court-martial convictions became final within the military appellate system before June 2, 1969, the date of the *O'Callahan* decision.

In part, respondent bases its position on this Court's decision in *De Stefano v. Woods*, 392 U.S. 631 (1968). In *De Stefano* this Court held that the jury trial requirements imposed upon the states by *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), should be prospective only. This Court's decision in *De Stefano* should not be determinative of the question here involved. It is well established that the retroactivity of a particular decision does not depend upon the constitutional provisions upon which a decision is based. *Desist v. United States*, 394 U.S. 244 (1969). In addition, this Court's opinion in *O'Callahan* clearly indicates that much more than the right to trial by jury and the right to indictment by grand jury was involved in *O'Callahan*. The right to trial in a *civilian* court, with all its attendant differences from trial by court-martial, was at the heart of the *O'Callahan* decision. The distinction between trial by jury and trial by selected members of the military forces and between indictment by grand jury and by the military counterpart, the Article 32 investigation, are only two of the distinctions between civilian and military jurisdiction thought significant by this Court in *O'Callahan*. Extreme importance is placed by this Court on the fact that a court-martial "has always been and continues to be primarily an instrument of discipline, not justice." 395 U.S. at 266. In addition, the Court places emphasis on such factors as the danger of command influence on all phases of the court-martial system and the differences between military judges and the judges in civilian courts. 395 U.S. at 264. The Military Justice Act of 1968, 82 Stat. 1335 did take strides toward curing many of the faults of the military system of justice. However, that Act can by no means be considered a complete cure for the problems which inundate the court-martial system and it certainly has not silenced the critics of that system. See, i.e., remarks of Senator Birch Bayh, CONG. REC., S10438, July 1, 1970 and S12862, August 6, 1970; Schiesser, *Trial by Peers: Enlisted Members of Courts-Martial*, 15 CATH. U. L. REV. 171 (1966); Schiesser

& Benson, *Modern Military Justice*, 19 CATH. U. L. REV. 489 (1970).

Contrary to *De Stefano v. Woods, supra*, *O'Callahan* involved the conviction of an individual by a court which had no jurisdiction over the particular offense of which he was accused. Despite any contention that court-martial convictions are not in general inherently unfair, it is submitted that court-martial convictions for offenses over which the court had no jurisdiction are *per se* unfair. This contention does not amount to a "mere playing with words" as is suggested by respondent (Brief for Respondent, page 31). Rather, the integrity of the fact-finding process by which petitioner was tried and sentenced is no less impugned by his conviction for an offense that the military had no power to try and punish him for than for an offense he did not commit. Petitioner does not contend that the same criteria that governed this Court's other retroactivity cases should not also govern its decision in the instant case. Those other cases have uniformly recognized that the effect of the proscribed practice on the integrity of the fact-finding process is the crucial question. See, e.g., *Stovall v. Denno*, 388 U.S. 293 (1967). The cases listed by respondent for the proposition that the courts have rejected arguments that retroactivity must follow from a finding of no jurisdiction are inapposite. (Brief for Respondent, page 32.) In the first place, both cases, *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968), and *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969), are civil rather than criminal cases and the same criteria should not apply. Furthermore, both *McSparran v. Weist* and *Lester v. McFaddon* hold that manufactured diversity does not constitute an adequate foundation for Federal jurisdiction. Unlike *O'Callahan*, they do not involve the constitutional limitation of a court's subject matter jurisdiction but merely determine that an established jurisdictional prerequisite does not exist under certain circumstances. Finally, in *Lester* the Court stated that, "Even if it be jurisdictional, diversity of citizenship is but a quasi-jurisdictional fact. A judgment based

upon an erroneous finding of diversity is not void and it is immune from collateral attack." 415 F.2d at 1107 (citing cases). It is submitted that a judgment based upon an erroneous finding of subject matter jurisdiction is void and is not immune from collateral attack. Obviously, these cases do not support the proposition that *O'Callahan* should be given prospective application only.

Respondent also asserts that a retroactive application of *O'Callahan* would have a disruptive effect on the administration of justice. (Brief for the Respondent, page 28.) Respondent bases this contention on a statement of the Army Judge Advocate General and on an observation of the Court of Military Appeals in its decision in *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970). To be sure, a reliable estimate of the number of court-martial convictions that could be overturned by a retroactive application of *O'Callahan* would probably be most difficult to secure. Nevertheless, respondent does not support its contention with any empirical data. Certainly if such data has been compiled, it would be available to respondent. In any event, respondent's assertion would seem subject to some question. In the first place, it appears that relatively few civilian crimes were tried in the military courts even prior to *O'Callahan*. The special civilian committee for the study of the U.S. Army confinement system has estimated that of the prisoners placed in confinement by the military, at least 85 percent and perhaps as many as 90 percent are men who have either absented themselves without leave or deserted. These are, of course, crimes involving a level of conduct required only of servicemen and are uniquely military in nature. The same study indicated that another three to five percent are in prison for other military type offenses, such as disrespect of a superior officer, failure to obey a lawful order and breaking restriction. In addition, empirical data has been compiled which indicates that since June 2, 1969, the date of the *O'Callahan* decision, there simply has not been the deluge of applications for review, petitions for reconsideration, applications for back pay or

rank, petitions for the issuance of a writ of habeas corpus and the like expected or posited by respondent and the military.

Finally, the purpose of the *O'Callahan* rule is to correct an abuse that, in fact, affects the integrity of the fact-finding process, a purpose well-served by retroactive application. Neither a reliance factor nor an impact on the administration of justice will avoid retroactive application in these circumstances. See *Desist v. United States,* 394 U.S. 244 (1969); *Roberts v. Russell,* 392 U.S. 293 (1968); *Witherspoon v. Illinois,* 391 U.S. 510 (1968).

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, it is respectfully submitted that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RELFORD *v.* COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 98. Argued December 15–16, 1970—Decided February 24, 1971

Petitioner, then an Army corporal, was convicted in 1961 by a general court-martial for violating Articles 134 and 120 of the Uniform Code of Military Justice by kidnaping and raping, within the bounds of a military reservation, two women—one, who was waiting for her serviceman brother who was visiting the base hospital; the other, who was on her way from the home on the base where she lived with her serviceman husband to the post exchange where she worked. In this habeas corpus proceeding the Court granted certiorari on the issue of the retroactivity and scope of *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), which held that a court-martial had no jurisdiction to try a member of the armed forces charged with attempted off-post rape of a civilian and related offenses since such crimes were not "service connected." *Held:*

1. Though some of the factors are present here that the Court relied on for its result in *O'Callahan* (the offenses were committed in peacetime within this country's territory, did not relate to the accused's military duties, were traditionally cognizable in civilian courts (which were available to try them), and did not directly flout military authority or violate military property), this case significantly differs from *O'Callahan* in that the crimes there were committed by a serviceman away from his base against a victim who had no connection with the base, whereas here the crimes were committed on the base against women properly there, one of whom was returning to her work on the base when the attack occurred. Pp. 9–10.

2. An offense committed by a serviceman on a military post that violates the security of a person or of property there is service connected and may be tried by a court-martial. Pp. 12–14.

3. The question of *O'Callahan*'s retroactivity is not decided. P. 15.

409 F. 2d 824, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 98.—October Term, 1970

Isiah Relford, Petitioner, v. Commandant, U. S. Disciplinary Barracks, Ft. Leavenworth, Kansas.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[February 24, 1971]

Mr. Justice Blackmun delivered the opinion of the Court.

In *O'Callahan* v. *Parker*, 395 U. S. 258, decided June 2, 1969, by a five-to-three vote, the Court held that a court-martial may not try a member of our armed forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were committed off-post on American territory, when the soldier was on leave, and when the charges could have been prosecuted in a civilian court. What is necessary for a court-martial, the Court said, is the the crime be "service connected." 395 U. S., at 272.

O'Callahan's military trial, of course, was without those constitutional guarantees, including trial by jury, to which he would have been entitled had he been prosecuted in a federal civilian court in the then Territory of Hawaii where the alleged crimes were committed.

O'Callahan already has occasioned a substantial amount of scholarly comment.[1] Much of it character-

[1] Everett, O'Callahan v. Parker—Milestone or Millstone in Military Justice?, 1969 Duke L. J. 853; McCoy, Equal Justice for Servicemen: The Situation Before and Since O'Callahan v. Parker, 16 N. Y. L. Forum 1 (1970); Nelson and Westbrook, Court-Martial

izes the decision as a significant one because it is said to depart from long-established, or at least long-accepted, concepts. Some of the literature is generally approving.[2] Some of it is generally critical.[3] Some of it, as did the *O'Callahan* dissent, 395 U. S., at 284, forecasts a period of confusion for both the civil and the military courts.[4] Not surprisingly, much of the literature is concerned with the issue of *O'Callahan*'s retrospectivity. Some writers assert that the holding must be applied retroactively.[5] Others predict that it will not be so

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Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L. Rev. 1 (1969); Wilkinson, The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker, 9 Washburn L. J. 193 (1970); Wurtzel, O'Callahan v. Parker: Where Are We Now?, 56 A. B. A. J. 686 (1970); The Supreme Court 1968 Term, 83 Harv. L. Rev. 7, 212–220 (1969); O'Callahan v. Parker, 395 U. S. 258 (1969): New Limitation on Court-Martial Jurisdiction, 61 J. Crim. L. C. & P. S. 195 (1970); Comment, 22 Baylor L. Rev. 64 (1970); Comment, 18 J. Pub. L. 471 (1969); Comment, 21 Mercer L. Rev. 311 (1969); Comment, 7 San Diego L. Rev. 55 (1970); Comment, 15 Vill. L. Rev. 712 (1970); Comment, 21 S. C. L. Rev. 781 (1969); Note, 70 Col. L. Rev. 1262 (1970); Note, 18 Kans. L. Rev. 335 (1970); Note, 3 Loyola (L. A.) L. Rev. 188 (1970); Note, 24 Miami L. Rev. 399 (1970); Note, 68 Mich. L. Rev. 1016 (1970); Note, 48 N. C. L. Rev. 380 (1970); Note, 64 Nw. U. L. Rev. 930 (1970); Note, 49 Ore. L. Rev. 237 (1970); Note, 23 Sw. L. J. 948 (1969); Note, 37 Tenn. L. Rev. 421 (1970); Note, 44 Tulane L. Rev. 417 (1970); 36 Brooklyn L. Rev. 259 (1970); 19 Buffalo L. Rev. 400 (1970); 38 Geo. Wash. L. Rev. 170 (1969); 31 Ohio St. L. J. 630 (1970); 22 Vand. L. Rev. 1377 (1969).

[2] McCoy, *supra;* 61 J. Crim. L. C. & P. S. 195; 18 Kans. L. Rev. 335; 19 Buffalo L. Rev. 400; 18 J. Pub. L. 471.

[3] Everett, *supra;* Nelson and Westbrook, *supra;* Wilkinson, *supra;* Wurtzel, *supra;* 15 Vill. L. Rev. 712; 24 Miami L. Rev. 399; 38 Geo. Wash. L. Rev. 170; 22 Vand. L. Rev. 1377.

[4] Comment, 22 Baylor L. Rev. 64; Comment, 18 Jour. Pub. L. 471; Note, 18 Kans. L. Rev. 335; Note, 23 Sw. L. J. 948; Note, 24 U. Miami L. Rev. 399; 31 Ohio St. L. J. 630.

[5] Wilkinson, *supra;* Comment, 22 Baylor L. Rev. 64; Note, 64 Nw. L. Rev. 930.

applied.[6] Naturally enough, *O'Callahan* has had its references in the federal courts of appeals[7] and in a significant number of cases in the United States Court of Military Appeals.[8]

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[6] Nelson and Westbrook, *supra;* Comment, 21 S. C. L. Rev. 781; Note, 3 Loyola (L. A.) L. Rev. 188, 198 n. 67; 44 Tulane L. Rev. 417, 424.

[7] See, for example, *Latney* v. *Ignatius,* 416 F. 2d 821 (CADC 1969); *Harris* v. *Ciccone,* 417 F. 2d 479, 488 (CA8 1969), cert. denied, 397 U. S. 1078; *Gallagher* v. *United States,* 423 F. 2d 1371 (Ct. Cl. 1970), cert. denied, 400 U. S. 849; *Silvero* v. *Chief of Naval Air Basic Training,* 428 F. 2d 1009 (CA5 1970); *King* v. *Moseley,* 430 F. 2d 732 (CA10 1970); *Zenor* v. *Vogt,* 434 F. 2d 189 (CA5 1970).

[8] *United States* v. *Borys,* 18 USCMA 547, 40 CMR 259 (1969); *United States* v. *Prather,* 18 USCMA 560, 40 CMR 272 (1969); *United States* v. *Becker,* 18 USCMA 563, 40 CMR 275 (1969); *United States* v. *DeRonde,* 18 USCMA 575, 40 CMR 287 (1969); *United States* v. *Boyd,* 18 USCMA 581, 40 CMR 293 (1969); *United States* v. *Cochran,* 18 USCMA 588, 40 CMR 300 (1969); *United States* v. *Chandler,* 18 USCMA 593, 40 CMR 305 (1969); *United States* v. *Crapo,* 18 USCMA 594, 40 CMR 306 (1969); *United States* v. *Harris,* 18 USCMA 596, 40 CMR 308 (1969); *United States* v. *Castro,* 18 USCMA 598, 40 CMR 310 (1969); *United States* v. *Henderson,* 18 USCMA 601, 40 CMR 313 (1969); *United States* v. *Riehle,* 18 USCMA 603, 40 CMR 315 (1969); *United States* v. *Williams,* 18 USCMA 605, 40 CMR 317 (1969); *United States* v. *Paxiao,* 18 USCMA 608, 40 CMR 320 (1969); *United States* v. *Smith,* 18 USCMA 609, 40 CMR 321 (1969); *United States* v. *Shockley,* 18 USCMA 610, 40 CMR 322 (1969); *United States* v. *Rose,* 19 USCMA 3, 41 CMR 3 (1969); *United States* v. *Armstrong,* 19 USCMA 5, 41 CMR 5 (1969); *United States* v. *Rego,* 19 USCMA 9, 41 CMR 9 (1969); *United States* v. *Camacho,* 19 USCMA 11, 41 CMR 11 (1969); *United States* v. *Cook,* 19 USCMA 13, 41 CMR 13 (1969); *United States* v. *Armes,* 19 USCMA 15, 41 CMR 15 (1969); *United States* v. *Morisseau,* 19 USCMA 17, 41 CMR 17 (1969); *United States* v. *Peak,* 19 USCMA 19, 41 CMR 19 (1969); *United States* v. *Plamondon,* 19 USCMA 22, 41 CMR 22 (1969); *United States* v. *Sharkey,* 19 USCMA 26, 41 CMR 26 (1969); *United States* v. *Weinstein,* 19 USCMA 29, 41 CMR 29 (1969); *United States* v. *Allen,* 19 USCMA 31, 41 CMR 31 (1969); *United States* v. *Safford,* 19

In the present federal habeas case, instituted several years after the applicant's conviction by court-martial, certiorari was granted "limited to retroactivity and scope of *O'Callahan* v. *Parker*. . . ." 397 U. S. 934 (1970). We thus do not reconsider *O'Callahan*. Our task here concerns only its application.

USCMA 33, 41 CMR 33 (1969); *United States* v. *Frazier*, 19 USCMA 40, 41 CMR 40 (1969); *United States* v. *Nichols*, 19 USCMA 43, 41 CMR 43 (1969); *United States* v. *Hallahan*, 19 USCMA 46, 41 CMR 46 (1969); *United States* v. *Huff*, 19 USCMA 56, 41 CMR 56 (1969); *United States* v. *Keaton*, 19 USCMA 64, 41 CMR 64 (1969); *United States* v. *Easter*, 19 USCMA 68, 41 CMR 68 (1969); *United States* v. *Stevenson*, 19 USCMA 69, 41 CMR 69 (1969); *United States* v. *Everson*, 19 USCMA 70, 41 CMR 70 (1969); *United States* v. *Fryman*, 19 USCMA 71, 41 CMR 71 (1969); *United States* v. *Higginbotham*, 19 USCMA 73, 41 CMR 73 (1969); *United States* v. *Adams*, 19 USCMA 75, 41 CMR 75 (1969); *United States* v. *Wysingle*, 19 USCMA 81, 41 CMR 81 (1969); *United States* v. *Gill*, 19 USCMA 93, 41 CMR 93 (1969); *United States* v. *McGonigal*, 19 USCMA 94, 41 CMR 94 (1969); *United States* v. *Fields*, 19 USCMA 119, 41 CMR 119 (1969); *United States* v. *Bryan*, 19 USCMA 184, 41 CMR 184 (1970); *United States* v. *Blackwell*, 19 USCMA 196, 41 CMR 196 (1970); *Mercer* v. *Dillon*, 19 USCMA 264, 41 CMR 264 (1970); *United States* v. *Peterson*, 19 USCMA 319, 41 CMR 319 (1970); *Gosa* v. *United States*, 19 USCMA 327, 41 CMR 327 (1970); *Wright* v. *United States*, 19 USCMA 328, 41 CMR 328 (1970); *Hooper* v. *Laird*, 19 USCMA 329, 41 CMR 329 (1970); *United States* v. *Haagenson*, 19 USCMA 332, 41 CMR 332 (1970); *In re Watson*, 19 USCMA 401, 42 CMR 3 (1970); *Brant* v. *United States*, 19 USCMA 493, 42 CMR 95 (1970); *United States* v. *Daniels*, 19 USCMA 529, 42 CMR 131 (1970); *United States* v. *Wills*, 20 USCMA 8, 42 CMR 200 (1970); *United States* v. *Lovejoy*, 20 USCMA 18, 42 CMR 210 (1970); *United States* v. *Ortiz*, 20 USCMA 21, 42 CMR 213 (1970); *United States* v. *Hargrave*, 20 USCMA 27, 42 CMR 219 (1970); *United States* v. *Davis*, 20 USCMA 27, 42 CMR 219 (1970); *United States* v. *Snyder*, 20 USCMA 102, 42 CMR 294 (1970); *United States* v. *Morley*, 20 USCMA 179, 43 CMR 19 (1970).

I

Isiah Relford, in 1961, was a corporal on active duty in the United States Army. He was stationed at Fort Dix, New Jersey.

On September 4, 1961, the visiting 14-year-old sister of another serviceman, who was on leave from his Army station at Fort Campbell, Kentucky, and who came to Fort Dix when his wife delivered a child at the base hospital, was abducted at the point of a knife from an automobile in the hospital's parking lot as she waited for her brother. The girl was raped by her abductor.

A few weeks later, on October 21, the wife of an Air Force man stationed at McGuire Air Force Base, adjacent to Fort Dix, was driving from her home on the base to the post exchange concession, also on the base, where she worked as a waitress. As the woman slowed her automobile for a stop sign, a man gained entry to the car from the passenger side and, with a knife at her throat, commanded the woman to drive on some distance to a dirt road in the fort's training area. She was raped there.

The second victim, with her assailant still in the automobile, was able to make her predicament known to military police. The assailant was apprehended and turned out to be Relford. He immediately admitted consensual intercourse with the victim. The next morning, after a brief interrogation, he confessed to kidnaping and raping both women.

At the time of each incident Relford was in civilian clothes.

It is undisputed that these events all took place on the military reservation consisting of Fort Dix and the contiguous McGuire Air Force Base.

Relford, in due course, was charged with raping and kidnaping each of the women, in violation of Articles 120 and 134, respectively, of the Uniform Code of Military Justice, 10 U. S. C. §§ 920 and 934.[9] He was tried by a general court-martial in December 1961 and was convicted on the four charges. Relford's sentence was the forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and death. The customary reference to the staff judge advocate was made and the convening authority approved. U. C. M. J. Arts. 60–65, 10 U. S. C. §§ 860–865. Upon the review by the Army Board of Review,[10] required under the Code's Article 66, 10 U. S. C. § 866, the conviction was sustained; the sentence, however, was reduced to hard labor for 30 years, total forfeitures, and a dishonorable discharge. The Court of Military Appeals denied a petition for review on September 24, 1963. *United States* v. *Relford*, 14 USCMA 678.

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[9] Rape is specified in Article 120 (a):

"§ 920. Art. 120. Rape and carnal knowledge

"(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."

Kidnapping is not specifically mentioned in the Code. The charge for that offense, therefore, was laid under Article 134, the General Article:

"§ 934. Art. 134. General article

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary, court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

[10] Now the Court of Miltiary Review. Pub. L. 90–632, § 2 (27), 82 Stat. 1341 (1968).

Relford's case thus became final more than five and a half years prior to this Court's decision in *O'Callahan* v. *Parker*.

In 1967, Relford, being in custody in the United States Disciplinary Barracks at Leavenworth, Kansas, filed his application for a writ of habeas corpus with the United States District Court for the District of Kansas. He alleged inadequate representation by counsel in the military proceeding. Chief Judge Stanley found no merit in the claim and denied the application. On appeal, Relford repeated the inadequate representation claim and, for the first time, raised questions as to the admissibility of his confession, as to a lineup procedure, and as to the fairness of his military trial. The Tenth Circuit reviewed all these claims on the merits, but affirmed the District Court's denial of relief. *Relford* v. *Commandant*, 409 F. 2d 824 (CA10 1969).[11]

The Tenth Circuit's opinion was filed on April 23, 1969, several weeks prior to this Court's decision in *O'Callahan* v. *Parker*. The issue as to the propriety of trial by court-martial, perhaps understandably, was not raised before Judge Stanley or on the appeal to the Tenth Circuit; the issue, however, had been presented in O'Callahan's chronologically earlier appeal in his habeas proceeding. See *United States ex rel. O'Callahan* v. *Parker*, 390 F. 2d 360, 363–364 (CA3 1968).

II

This case, as did *O'Callahan*, obviously falls within the area of stress between the constitutional guarantees contained in the Constitution's Article III, § 2, Clause 3, in the Sixth Amendment, and possibly in the Fifth Amendment, on the one hand, and, on the other, the

[11] We are advised by the parties that Relford was released on parole on May 20, 1970.

power vested in the Congress, by the Constitution's Article I, § 8, Clause 14, "to make Rules for the Government and Regulation of the land and naval Forces," with its supportive Necessary and Proper provision in Clause 18, and the Fifth Amendment's correlative exception for "cases arising in the land or naval forces."

Relford argues that *O'Callahan*'s requirement that the crime be "service connected" before a court-martial may sit demands that the crime itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action. He further states that the charges against him—like those against O'Callahan—do not involve a level of conduct required only of servicemen. He maintains that occurrence of the crimes on a military reservation and the military-dependent identity of one of his victims do not substantially support the military's claim of a special need to try him.

In further detail, it is stated that the Court in *O'Callahan* recognized that a court-martial "remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved," 395 U. S., at 265; that military courts, of necessity, are not impartial weighers of justice, but have as their primary consideration the enforcement of the unique discipline required of a fighting force; and that, as a consequence, the court-martial must be limited to the "least possible power adequate to the end proposed." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 22–23 (1955), citing *Anderson* v. *Dunn*, 19 U. S. (6 Wheat.) 204, 230–231 (1821).

It is then said that the level of conduct Relford is alleged to have violated, that is, intercourse only with consent, is the very same level required in the civilian

community and is not altered by considerations of military dependency; that his alleged crimes are no more military than were O'Callahan's; that the ability of the military to perform its mission remains the same whether the crimes with which he was charged were committed on base or off base; that any interest in the maintenance of order on the base is adequately served by apprehension of the offender and trial in a civilian court; that the on-post/off-post distinction has little meaning; that it is the nature of the crime that is important; that the crimes charged to Relford stand in contrast to purely military crimes such as desertion, absence without leave, missing movement, assaulting a superior commissioned officer, and being drunk on duty, Arts. 85, 86, 87, 90, and 112, 10 U. S. C. §§ 885, 886, 887, 890, and 912; and that only crimes of the latter type have "an immediate adverse impact upon the ability of the military to perform its mission," and are "proper subjects for the exercise of military jurisdiction."

III

In evaluating the force of this argument, the facts of *O'Callahan* and the precise holding in that case possess particular significance. We repeat: O'Callahan was in military service at the time and was stationed at a base in American territory. His offenses, however, took place off base in a civilian hotel while he was on leave and not in uniform.

MR. JUSTICE DOUGLAS, in speaking for the Court, said:

> "In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or

> enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.
>
> "Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property." 395 U. S., at 273–274.

We stress seriatim what is thus emphasized in the holding:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense's being among those traditionally prosecuted in civilian courts.

IV

This listing of factors upon which the Court relied for its result in *O'Callahan* reveals, of course, that it chose to take an *ad hoc* approach to cases where trial by court-martial is challenged. We therefore turn to those factors in Relford's case that, as spelled out in O'Callahan's, bear upon the court-martial issue.

It is at once apparent that elements 4, 6, 8, 11, and 12, and perhaps 5 and 9, operate in Relford's favor as they did in O'Callahan's: The offenses were committed within the territorial limits of the United States; there was no connection between Relford's military duties and the crimes with which he was charged; courts in New Jersey were open and available for the prosecution of Relford; despite the Vietnam conflict we may assume for present purposes that the offenses were committed in peacetime and that they were unrelated to any problem of authority stemming from the war power; military authority, directly at least, was not flouted; the integrity of military property was not violated; and the crimes of rape and kidnaping are traditionally cognizable in the civilian courts.

Just as clearly, however, the other elements, present and relied upon in O'Callahan's case, are not at hand in Relford's case. These are elements 1, 2, 3, 7, and 10: Relford was not absent from the base; the crimes were committed on the military enclave; the second victim, because of her duties at the post exchange and because of the fact that her abduction and the attack upon her took place as she was returning to the PX at the end of a short and approved break in her work, was engaged in the performance of a duty relating to the military; and the security of two women properly on the post was threatened and, indeed, their persons were violated.

There are still other significant aspects of the Relford offenses: The first victim was the sister of a serviceman who was then properly at the base. The second victim was the wife of a serviceman stationed at the base; she and her husband had quarters on the base and were living there. Tangible property properly on the base, that is, two automobiles, were forcefully and unlawfully entered.

V

With the foregoing contrasting comparison of the pertinent factual elements of *O'Callahan* with those of Relford's case, we readily conclude that the crimes with which Relford was charged were triable by a military court. We do not agree with petitioner when he claims that the "apparent distinctions" between this case and *O'Callahan* "evaporate when viewed within the context of the 'service-connected' test." [12] We stress: (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. Relford concedes the existence of this vital interest.[13] (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. See *Cafeteria & Restaurant Workers Union, Local 473, AFL–CIO* v. *McElroy*, 367 U. S. 886 (1961). Relford also concedes this. (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission. (d) The conviction that Article I, § 8, Clause 14, vesting in the Congress the power "To make Rules for the Government and Regulation

[12] Brief, p. 9.

[13] Reply brief, p. 2.

of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term "Regulation" itself implies, for those appropriate cases, the power to try and to punish. (e) The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary problems within its own community. See W. Winthrop, Military Law and Precedents, 725 (2d ed. 1896, 1920 Reprint); Wilkinson, 9 Washburn Law J. 193, 208 (1970). (f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance. (g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. The comment from Winthrop, 723–724:

> "Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower . . . inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses." (Footnotes omitted.)

cited both by the Court in *O'Callahan*, 395 U. S., at 274, n. 19, and by the dissent at 278–279, certainly so indi-

cates and even goes so far as to include an offense against a civilian committed "near" a military post. (h) The mis-reading and undue restriction of O'Callahan if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law. (i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post.

This leads us to hold, and we do so hold, that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. Expressing it another way: a serviceman's crime against the person of an individual upon the base or against property on the base is "service connected," within the meaning of that requirement as specified in *O'Callahan,* 395 U. S., at 272. This delineation, we feel, fully comports with the standard of "the least possible power adequate to the end proposed" referred to in *O'Callahan,* 395 U. S., at 265.

By this measure, Relford's alleged offenses were obviously service-connected. There is, therefore, no constitutional or statutory barrier and Relford was properly tried by a court-martial.

VI

We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time.

VII

Having reached this result on the court-martial issue, the additional issue, that the parties have argued, of *O'Callahan*'s retrospectivity, need not be decided. See *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). We recognize that the retroactivity question has important dimensions, both direct and collateral, and that the Government strongly urges that the question be decided here and now. We have concluded, however, that the issue is better resolved in other litigation where, perhaps, it would be solely dispositive of the case. We take some comfort in the hope that the present decision should eliminate at least some of the confusion that the parties and commentators say has emerged from *O'Callahan*.[14]

Affirmed.

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[14] The Solicitor General supplied the following data relative to selected types of offenses over which the Army assumed jurisdiction in 1967:

Offense	*Number Occurring on Military Reservations*	*Number Occurring off Military Reservations*
1. Homicides	30	24
2. Sexual crimes (Rape, indecent assaults, etc.)	214	105
3. Robbery	112	44
4. Assaults	451	160
5. Burglary and Housebreaking	165	28
6. Arson	24	3
7. Larceny	1029	74
8. Larceny of motor vehicle	221	56
9. Narcotics offenses (including marihuana and dangerous drugs)	833	106
10. Disorderly conduct	59	22